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Supreme Court, U.S.
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In The

Supreme Court of the United States

LEONARD JAMES McSHERRY,

Petitioner,

v.

CITY OF LONG BEACH; LONG BEACH POLICE DEPARTMENT; NORMAN TURLEY AND CARTHEL S. ROBERSON, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Despite a conflict in circuit authority, does *Malley v. Briggs*, 475 U.S. 335 (1986), mandate that summary judgment be granted to a defendant police officer who fabricated evidence to implicate an innocent man, on the ground that a prosecutor's decision to file criminal charges against an innocent suspect is an independent cause that insulates the officer from 42 U.S.C. §1983 liability for the resulting wrongful criminal conviction and 14-year imprisonment, where the prosecutor had no knowledge of the officer's unconstitutional conduct?

2. Despite a conflict in circuit authority, does *Briscoe v. LaHue*, 460 U.S. 325 (1983), which granted absolute immunity to police officers for trial perjury, mandate summary judgment in favor of a 42 U.S.C. §1983 defendant police officer for his highly prejudicial, perjured trial testimony where the officer was functionally equivalent to a "complaining witness," in light of *Malley v. Briggs*, 475 U.S. 335 (1986)?

3. Despite a conflict in circuit authority, does the rule of *Hartman v. Moore*, 547 U.S. 250 (2006), that, in order to avoid summary judgment, a retaliatory prosecution plaintiff must establish absence of probable cause for arrest and prosecution in order to prevail, apply to section 1983 claims based on Fourth Amendment and Due Process violations?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leonard James McSherry respectfully petitions for a writ of certiorari to the Ninth Circuit Court of Appeals.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is published at 584 F.3d 1129 (2009). App. 1. The relevant trial court proceedings and summary judgment order are unpublished.

JURISDICTION

The Ninth Circuit denied rehearing and rehearing en banc on January 20, 2010. App. 73. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

United States Const. Amend. IV provides in relevant part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

United States Const. Amend. XIV provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Factual Background

On March 11, 1988, a six-year-old girl was kidnapped from a playground on a Naval Base in Long Beach, California. The perpetrator took her to a location where he raped her before releasing her several hours later.

When the victim was located on March 12, she told the patrol officers who initially interviewed her she was taken by the perpetrator to a small place with two rooms that was white on the outside with the numbers "1" and "0" on the door. She described the kidnapper as a white male with black hair and mustache, short, fat and older than her grandfather. She stated he forced her to get into a green, "strange car." That same day, the victim's four-year-old brother, who witnessed the abduction, reported to officers that his sister had gotten into a green car with a man who was "red in color" and had black hair.

Shortly thereafter, Respondents Norman Turley and his supervisor, Carthel Roberson, members of the Long Beach Police Department, drove the victim around Long Beach for approximately one hour trying to find the location of the rape. The victim told them the place was either brown or had a brown door, had stairs, was upstairs, and had a TV, a bedroom with no pictures on the wall.

On March 14, 1988, a witness described a suspicious looking man near the playground around the

time that the victim was abducted. She described the man as white, 35+ years old, 5'7" to 5'9" and "heavy," with dark brown to black hair, mustache, heavy black eyebrows and a chubby pock-marked face. She noticed a green pickup truck, which she had not seen before, in the area.

Petitioner did not fit the physical descriptions given by any of the witnesses, nor did he have access to any location described by the victim. At the time, Petitioner drove a yellow station wagon.

On May 17, 1988, Respondent Turley arrested Petitioner at his grandparent's home, where he had been living in March 1988. The home was a blue, single family, one-story dwelling, numbered 829, with a kitchen, several bedrooms, blue sheets on the bed and pictures on the walls in Petitioner's room. Following the arrest, Petitioner was interrogated by Turley and Roberson and gave a detailed description of the interior of his grandparents' home.

At Petitioner's criminal trial, the victim had little recollection of the relevant events and did not testify about them. Instead, Respondent Turley testified about the victim's photo identifications of Petitioner, the yellow vehicle and the detailed description of the rape location allegedly given by the victim on May 18, 1988, the day after Petitioner gave a detailed description of the interior of the home in which he resided to Turley. Thus, the evidence which, according

to the state trial court, compelled the guilty verdict, came not from the victim, but from Turley.[1]

Petitioner was convicted after jury trial in October 1988 and sentenced to state prison for a term of 48 years to life.

In December 2001, nearly fourteen years into his sentence, Petitioner was exonerated by DNA evidence. The DNA revealed that a then state prison inmate had kidnapped and raped the victim. He later

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[1] According to Turley's trial testimony, the victim described a picture on a wall, blue sheets on a bed with a white blanket, a black chair near a mirror, the location of a T.V., a white, push-button telephone, a fold-up door, a big window with a seat and a bird singing next door. This detailed description matched the interior of Petitioner's grandparents' home at which he was arrested. Turley also testified that the victim identified a photo of Petitioner's grandparents' house as that where she had been raped.

The prosecutor focused on this evidence in his argument to the jury:

> "How could anybody talk about [the] house like that?
>
> She must have been in the house. How did she know [about the] blue sheets?
>
> Do you think that that gives credence and credibility to [the victim]? You bet. . . .
>
> That she is able to describe the inside of a house. This is an unimaginable coincidence."

In denying Petitioner's motion for new trial, the state criminal trial judge remarked that the most convincing prosecution evidence was the victim's description of the interior of Petitioner's grandparents' home.

> "That bedspread stands out in my mind. . . . Her testimony weighed very heavily in how I felt about the rightness of the jury's verdict."

confessed to the crimes using his green pickup truck and taking her to a motel where he committed the rape.

On December 28, 2001, Petitioner was released from prison pursuant to a writ of habeas corpus issued by the Los Angeles Superior Court. The state court vacated the judgment, set aside his October 1988 conviction, dismissed all charges and declared him factually innocent of the charges.

In May 2002, Petitioner brought suit under 42 U.S.C. §1983, alleging: (1) Fourteenth Amendment due process violations for unconstitutional police interview procedures; (2) Fourth and Fourteenth Amendment false arrest claims based on false witness identifications; (3) failure to train and supervise; (4) negligent hiring; and (5) supervisory liability, seeking damages against the City of Long Beach and the two Respondent Long Beach police officers. The claims were based on Turley and Roberson's (1) fabricating the victim's identification of the vehicle used in the kidnapping; (2) fabricating the victim's detailed description of the interior of the home where the rape occurred; (3) coercing the six-year-old victim's identification of McSherry as the perpetrator; (4) ignoring exculpatory evidence; and, (5) arresting Petitioner without probable cause. In sum, Petitioner alleged that Turley and Roberson had arrested and pursued prosecution of McSherry, based on evidence they fabricated, knowing he was innocent.

PROCEEDINGS BELOW

In October 2003, on the first day scheduled for trial, the district court granted Respondents' Motion for Judgment as a Matter of Law under Fed.R.Civ.P. 50, on the ground of qualified immunity. Petitioner appealed. The Ninth Circuit reversed. *McSherry v. City of Long Beach*, 423 F.3d 1015, 1021 (9th Cir. 2005) ("*McSherry I*").

Following remand, the district court granted summary judgment in favor of all Defendants on the ground of qualified immunity. Following appeal, the Ninth Circuit again reversed. *McSherry v. City of Long Beach*, 560 F.3d 1125 (9th Cir. 2009) ("*McSherry II*"). App. 45. Thereafter, rehearing was granted and the Court of Appeals withdrew its opinion in *McSherry II* and affirmed the district court's grant of summary judgment in its entirety. *McSherry v. City of Long Beach*, 584 F.3d 1129 (2009) ("*McSherry III*"). App. 1. Petitioner's petition for rehearing and rehearing en banc was denied. App. 73.

WHY CERTIORARI SHOULD BE GRANTED

1. *Malley v. Briggs*, 475 U.S. 335, 345 n. 7 (1986), citing *Monroe v. Pape*, 365 U.S. 167, 187 (1961), is the only case where this Court has mentioned the applicability of the common law superseding cause principle on the causation requirement of 42 U.S.C. §1983. In a somewhat cryptic footnote, this Court indicated its interpretation of section 1983

would not allow for judicial action to break the chain of causation between an officer's unlawful conduct and resulting damages because "§1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

Several circuits apply *Malley's* common law principle of natural consequences or foreseeability in analyzing the effect of an independent, intervening cause. *See Kerman v. City of New York,* 374 F.3d 93, 126 (2d Cir. 2004); *Zahrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1072-73 (2d Cir. 1996). Other circuits have found an independent intervening cause where no facts have been withheld from the allegedly independent cause. *See Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988); *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005). Still other circuits, including the Ninth, have created a presumption that section 1983 officer defendants are not liable for their unconstitutional acts causing damages to an arrested person after a district attorney uses independent judgment to file formal charges. *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981) ("*Smiddy I*"). This presumption of independent judgment may be rebutted if the prosecutor's judgment is not based on all information relevant to the initiation of the prosecution. *Burke v. McDonald*, 572 F.3d 51, 58 (1st Cir. 2009); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); *Anthony v. Baker*, 767 F.2d 657, 660 (10th Cir. 1985); *Smiddy v. Varney*, 803 F.2d 1469, 1471

(9th Cir. 1986) ("*Smiddy II*"). Some Circuits apply a more stringent test to determine whether the causal chain remains unbroken when there is another contributing cause to the section 1983 plaintiff's damages. *See Duncan v. Nelson*, 466 F.2d 939, 943 (7th Cir. 1972). Finally, some courts avoid the issue altogether because of the lack of clarity regarding the applicability of the common law principle of superseding causation to section 1983. *See Hector v. Watt*, 235 F.3d 154, 161 (3d Cir. 2000).

This case allows this Court to resolve the conflict between the circuits regarding the effect of the prosecutor's filing decision on the liability of the officer for his unconstitutional conduct, where the prosecutor did not know the evidence on which he was relying was fabricated.

Is there a presumption the prosecutor's decision to file charges breaks the chain of causation for an officer's unconstitutional conduct and, if so, can the prosecutor's decision to file charges be the result of independent judgment and insulate the section 1983 defendant officer from further responsibility for damages, even though the prosecutor is unaware the officer seeking charges fabricated evidence and provided perjured testimony in order to convict and imprison the section 1983 plaintiff? Is there no such presumption and does the common law tort principle of foreseeability determine whether an intervening cause can insulate the offending officer from section 1983 liability?

2. In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court granted absolute immunity to police officers for

perjured trial testimony. In *Malley v. Briggs*, 475 U.S. 335, 340 (1986), absolute immunity was held unavailable to testifying officers who acted as "complaining witnesses" in applying for arrest warrants.

The unfounded criminal prosecution and conviction of Petitioner was based on the unconstitutional conduct by Respondent Turley, who manufactured probable cause for McSherry's arrest, manipulated and coerced the six-year-old victim to allegedly make a false identification, fabricated evidence and testified falsely at Petitioner's trial. Turley thus was responsible for initiating the prosecution and obtaining the conviction of Petitioner. This Court should grant certiorari to determine the applicability of *Malley* to *Briscoe*.

3. This Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), has been interpreted by the Ninth Circuit as requiring that in all claims under 42 U.S.C. §1983, including those based on Fourth Amendment and Due Process grounds, the plaintiff must establish the absence of probable cause for arrest and prosecution in order to prevail. This case allows the Court to resolve a conflict between the circuits on whether *Hartman* is applicable to claims other than those based on First Amendment retaliatory prosecution. Additionally, if this Court should find the rule of *Hartman* is so applicable, should it be interpreted to entitle a defendant police officer to summary judgment on his behalf where he manufactures probable cause for arrest to inculpate the knowingly innocent section 1983 plaintiff, and thereafter

gives perjured testimony at the plaintiff's criminal trial, causing his wrongful conviction and 14-year imprisonment?

ARGUMENT

I. 42 U.S.C. §1983 DOES NOT SHIELD A CULPABLE DEFENDANT OFFICER FROM LIABILITY FOR RESULTING DAMAGES AFTER THE PROSECUTOR FILES FORMAL CHARGES BASED ON THE UNCONSTITUTIONAL ACTS OF THE OFFICER, WHERE THE PROSECUTOR IS UNAWARE OF THESE ACTS AND THE OFFICER DOES NOT DISCLOSE THEM.

Here, Turley fabricated and presented evidence to an unaware prosecutor, without disclosing the fabrication to him. Nevertheless, the district court granted summary judgment against Petitioner on the ground that the prosecutor's filing decision broke the causal connection between Turley's unconstitutional conduct and Petitioner's wrongful conviction and imprisonment. The Circuit Court did so on summary judgment, after Petitioner raised a triable issue that the prosecutor did not know the evidence presented to him as the basis for the criminal filing was fabricated and in fact, relied on the fabricated evidence in making the filing decision.

In *Malley v. Briggs*, 475 U.S. 335, 345 n. 7 (1986), this Court stated it would reject the argument that a section 1983 defendant police officer would not be

liable for damages caused by his misconduct in seeking an arrest warrant because the judge's decision to issue the warrant breaks the causal chain between the officer's application for the warrant and an unlawful arrest. Citing *Monroe v. Pape*, 365 U.S. 167 (1961), this Court stated section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing the same causal link." (Internal quotations omitted).

This footnote has resulted in conflicting Circuit opinions concerning the applicability of common law intervening cause principles to the causation requirements of section 1983.

Some circuits have interpreted this Court's *Malley* footnote as incorporating into section 1983, the "natural and probable consequences" tort principle of causation. For example, in *Kerman v. City of New York,* 374 F.3d 93, 126 (2d Cir. 2004), the court held a police officer could be liable for plaintiff's loss of liberty after the plaintiff was sent to a mental hospital because of an officer's wrongful conduct, even though the plaintiff's subsequent detention in the hospital resulted from the independent judgment of the physicians. The court stated: "Tort defendants, including those sued under §1983, are responsible for the natural consequences of their actions." In *Zahrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000), the Court stated "it is not readily apparent why the chain of

causation should be considered broken where the initial wrongdoer can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation of liberty." In *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1072-73 (2d Cir. 1996), the appeals court concluded that a sentencing judge's adoption of a probation officers' wrongful recommendation was entirely foreseeable; therefore, the judge's decision did not break the chain of causation with respect to the probation officers' liability under section 1983. In *Buenrostro v. Collazo*, 973 F.2d 39, 45 (1st Cir. 1992), the Court of Appeals citing *Malley*, held this Court "has made it crystal clear that principles of causation borrowed from tort law" apply to constitutional torts, and a jury "could conceivably find a causal nexus between [an] unlawful arrest and [a] consequent imprisonment," even after an independent magistrate determined there was probable cause to detain the plaintiff.

At least one circuit court applies a more stringent test to determine whether the causal chain remains unbroken when there is another contributing cause to the section 1983 plaintiff's damages. *Duncan v. Nelson*, 466 F.2d 939, 943 (7th Cir. 1972), held no section 1983 cause of action exists for violation of Fifth Amendment rights resulting from admission into evidence at trial of a coerced confession, since the officers did not proximately cause the violation.

Some circuits note that "the chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary, where the malicious motive of the law enforcement officials

does not lead them to withhold any relevant information from the independent intermediary." *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988). In *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005), the defendant officer, in violation of the 5th Amendment rule of *Garrity v. New Jersey*, 385 U.S. 493 (1967), compelled the section 1983 plaintiff to incriminate himself during an internal police investigation. The officer, like Respondents here, then turned the statements over to the prosecutor, who filed formal criminal charges against the section 1983 plaintiff and used the officer as a witness to introduce the statements at the criminal trial. The *McKinley* court held the damages resulting from the introduction of the statements at trial were the natural and probable consequences of the officer's constitutional deprivation. *Id.* at 438. The Court of Appeals suggested "[a] police officer may defend on the grounds that he attempted to prevent the use of the allegedly incriminating statements at trial, or that he never turned the statements over to the prosecutor in the first place." *Id.* The Court of Appeals in *Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004), held a legally erroneous ruling under the International Child Abduction Remedies Act authorizing seizure and removal of plaintiff's child without notice was an intervening superseding cause of the plaintiff's injuries precluding a *Bivens* claim against State Department officials. "[T]o the extent that the common law recognized the causal link between a complaint and the ensuing arrest, it was in the situation where 'misdirection' by omission or commission perpetuated the original wrongful behavior."

This conflict in the Circuits regarding principles of superseding causation to section 1983 claims has resulted in some courts avoiding the issue altogether. *See Hector v. Watt*, 235 F.3d 154, 161 (3d Cir. 2000) (declining to reach the question of whether proximate cause prevented a section 1983 plaintiff from suing police officers for fabricating evidence as "there is a great deal of tension in the caselaw about when official conduct counts as an intervening cause.").

In this case, the Ninth Circuit adopted the most extreme view of intervening causation: that the prosecutor's decision to file charges based on fabricated evidence, breaks the causal connection between the police officer's wrongful conduct and the lengthy, wrongful imprisonment. *McSherry II*, 584 F.3d at 1146-47. Indeed, the Ninth Circuit's decision that the prosecutor's filing decision broke the causal chain was based on the prosecutor's acceptance of the fabricated evidence in making the filing decision.[2] Accordingly, this case presents the ideal circumstances for the Court to resolve the conflict in the circuits

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[2] The prosecutor averred in his declaration:

"A When [the victim's] description of a room where these events took place meets a description of a room that's found that fits that description, that's corroboration of her testimony.

Q Did you ever talk to [the victim] about the original description that she had given about the place where she had been taken and raped?

A No. . . ."

McSherry II, 584 F.3d at 1145.

relating the applicability to section 1983 claims of the common law tort rules of superseding, intervening causation. The Court should grant certiorari and hold that when a police officer presents a prosecutor with fabricated evidence and the prosecutor makes a charging decision based on that evidence, *without knowing the evidence was false*, the causal connection between wrongful conduct and section 1983 damages is not broken. Here, Petitioner should be permitted to proceed to trial to present to the jury the evidence of fabrication and the prosecutor's absence of knowledge that the evidence was fabricated.

II. POLICE OFFICERS WHO ACT AS COMPLAINING WITNESSES ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FOR PERJURED TRIAL TESTIMONY.

Absolute immunity to section 1983 claims is available only under certain narrow exceptions and it is the burden of the party claiming immunity to justify the exception. *Malley v. Briggs*, 475 U.S. 335, 340 (1986); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held police officers in some circumstances may be entitled to absolute immunity for perjury committed in the course of official proceedings. This Court found that absolute immunity for witnesses and parties "for testimony in judicial proceedings as well as absolute immunity for officials in the judicial

process was established in English common law" prior to 1871.[3]

Three years later, in *Malley*, 475 U.S. at 341-45, this Court held an officer who functions as "complaining witness" by providing an affidavit in support of an arrest warrant to a magistrate, is not entitled to absolute immunity for the falsity of the affidavit. Relying on *Malley*, a number of circuit opinions have expanded the exception to the *Briscoe* rule of absolute immunity to perjury by police officers who functionally act as complaining witnesses by wrongfully bringing and perpetuating a prosecution in preliminary hearings, grand jury and trial proceedings. *See Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997) (no absolute immunity for trial perjury by officer who acted as complaining witness).

"A complaining witness is a person 'who actively instigated or encouraged the prosecution of the plaintiff.'" *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001) (quoting *Anthony v. Baker*, 955 F.2d 1395, 1399 n. 2 (10th Cir. 1992). There can be more than one complaining witness in a case. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 129-30, 131 (1997) (prosecutor was acting as a complaining witness when she

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[3] The common law distinguished between defamation actions for which the witness was absolutely immune and actions for malicious prosecution, for which there was no absolute immunity. *Briscoe*, 460 U.S. at 330-31. Section 1983 is a codification of §1 of the Civil Rights Act of 1871. *See id.*, 460 U.S. at 337.

certified in affidavit in support of arrest warrant that accused burglary suspect was positively identified "from a photo montage" by another witness). *Id.* at 121. By personally vouching for the truth of the statements of another witness inculpating the petitioner, the prosecutor acted as a "complaining witness." *Id.* at 131.

Here, the district court determined on summary judgment that Turley was not a complaining witness despite evidence to the contrary. But the question of whether a police officer is a complaining witness is a question of fact. *Anthony v. Baker*, 955 F.2d at 1399-1400; *see also Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 511 (5th Cir. 1992) (declining to grant absolute immunity to defendant officer where "disputed factual issues remain regarding [defendant]'s role in actively instigating, encouraging, and/or perpetuating [plaintiffs'] prosecution"); *Anthony v. Baker*, 955 F.2d at 1396-97, 1402 (plaintiff's allegations that sheriff instigated grand jury investigation of plaintiff and testified falsely against plaintiff at grand jury proceedings and state court probable cause hearing could provide a factual basis for the district court to conclude that [sheriff] indeed was a complaining witness at both proceedings). Hence, the appeals court disregarded the cardinal rule on summary judgment that in the face of *conflicting evidence and inferences*, the jury must resolve the ultimate facts, as in this case, whether Respondent Turley was or was not a "complaining witness."

In *Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997), defendant officers constructed a false version of events, knowing that it would lead to the section 1983 plaintiff's indictment, arrest, and trial for murder. *Id.* at 119. The court, interpreting *Malley* as an exception to *Briscoe*, held the officers acted as "complaining witnesses" and were not entitled to absolute immunity for false testimony, either before the grand jury that indicted the plaintiff or at his criminal trial on those charges. In reaching its conclusion, the *Harris* court relied on opinions of other circuits. *See White v. Frank*, 855 F.2d 956, 961 (2d Cir. 1988) (his role as a "complaining witness" renders him liable to the victim under section 1983, just as it did at common law, and the fact that his testimony at a judicial proceeding may have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution); *Anthony v. Baker*, 955 F.2d 1395, 1400 (10th Cir. 1992) (officer not entitled to absolute immunity for grand jury testimony "that is relevant to the manner in which he initiated or perpetuated the prosecution"); *Enlow v. Tishomingo County*, 962 F.2d 501, 512 (5th Cir. 1992) (no immunity for grand jury witness who initiates or perpetuates the prosecution).

This case is a prime example of the fateful consequences of providing absolute immunity to police officers for perjured testimony where they instigate the prosecution and provide testimony which is the *sine qua non* of conviction and imprisonment. Respondent

Turley fabricated probable cause for Petitioner's arrest and thereafter committed perjury that directly caused Petitioner's wrongful conviction and 14-year imprisonment. Trial perjury was just part of the full range of falsehoods by Turley without which Petitioner's unconstitutional deprivations would not have occurred. Indeed, because the victim was just 6 years old, Turley provided both the evidence to the filing prosecutor and *trial testimony* about the victim's statements, that resulted in conviction. He was functionally the complaining witness, since the victim herself was unable to testify about the facts necessary for conviction.

This Court should grant certiorari to determine the extent of *Malley*'s exception to the absolute immunity granted to police officers for trial perjury under *Briscoe,* and whether, on summary judgment, the appeals court can make a factual determination about whether the testifying police office was a "complaining witness" in the face of conflicting evidence.

III. THE RULE OF *HARTMAN v. MOORE* SHOULD BE LIMITED TO RETALIATORY PROSECUTION CLAIMS AND NOT BE APPLICABLE TO 42 U.S.C. §1983 CLAIMS BASED ON THE FIFTH AMENDMENT.

In *Hartman v. Moore*, 547 U.S. 250, 257 n. 5, 265-66 (2006), this Court decided a *Bivens* plaintiff must plead and prove the absence of probable cause for

prosecution in order to prevail on a First Amendment retaliatory prosecution claim. This Court reasoned the requisite causation between the defendant's retaliatory animus and the plaintiff's injury in such cases is more complex than in other retaliation cases since the retaliatory animus is not merely that of one person and that person's own action causing the injury, but between the retaliatory animus of one person and the action of another who is immune from liability. *Id.* at 259-62.

The *Hartman* decision was a response to circuit opinions holding evidence of retaliatory motive and discharge was sufficient to establish causation. This Court concluded:

> "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive."

Id. at 261.

But *Hartman* also made a clear distinction between retaliatory prosecution actions to which the no-probable cause pleading and proof requirements apply, and "ordinary" retaliation actions to which the requirements do not apply (i.e., those where there is no independent prosecutorial action). *Id.* at 259-62; *accord Skoog v. County of Clackamas*, 469 F.3d 1221,

1233-34 (9th Cir. 2006) (recognizing *Hartman*'s absence of probable cause pleading and proof requirement applies to "a particular subcategory of retaliation claims: retaliatory prosecution claims"); *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002) (holding that a claim for retaliatory arrest can be made even if probable cause existed for the arrest); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (same). *Cf. Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Keenan v. Tejeda*, 290 F.3d 252, 261-62 (5th Cir. 2002); *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); and *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000).

This case does not involve a retaliation claim. Accordingly, although there is an intervening prosecutorial filing decision, there is no complex issue of proof of retaliatory animus causation involving an immunized actor and therefore no need to apply the objective no probable cause requirement of *Hartman*. This Court should grant review and hold that *Hartman* does not apply to non-retaliatory constitutional claims and resolve the split in authority in the Circuit courts regarding this issue.

A. Even If *Hartman* Were Applicable To This Case, Respondent Is Not Entitled To Summary Judgment In His Favor Where He Manufactured The Probable Cause For Arrest.

Petitioner presented evidence to the trial court that probable cause to arrest him arose only after Respondents Turley and Roberson became involved in the investigation and unduly suggested or coerced identifications of McSherry and the vehicle associated with him or fabricated such identifications. Petitioner also presented evidence from which the jury could infer that Respondents knew Petitioner was innocent and intentionally violated his rights to Due Process.

The original witness descriptions of the perpetrator and the vehicle given to police officers matched the physical description of the actual perpetrator and his vehicle, which was used to abduct the victim. Additionally, in her deposition, the victim testified that, during the photo showup, Turley suggested Petitioner as the perpetrator and she also denied ever selecting Petitioner's vehicle from a photo array, as Respondent Turley claimed and testified.

Because of the DNA evidence and the confession of the actual perpetrator, it is evident the victim and her brother did not see Petitioner or the vehicle associated with him on the date of the crimes. Further, the victim, who had never been in Petitioner's grandparents' house, denied at her deposition giving the detailed description of it which Respondent Turley

falsely claimed and testified she described in extraordinary detail. Yet the prosecutor relied on this description of the interior of the house in filing charges. Under these circumstances, there is a factual dispute as to whether the prosecutor's decision to file formal charges was an independent cause of the wrongful conviction and fourteen years imprisonment suffered by Petitioner. It is for the jury and not the appellate court to resolve this factual dispute.[4]

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[4] In affirming the district court's grant of summary judgment against Petitioner, the court below failed to consider evidence establishing the prosecutor's investigation relating to the victim's photo showups was not "independent" because he was unaware of Respondent Turley's coercive tactics, unduly suggestive identifications and fabrications and merely reinterviewed the victim tainted by those unconstitutional tactics. Additionally, the prosecutor determined the photo showup by Turley was not suggestive merely by looking at the photos without inquiring whether Turley influenced the victim's identification. Yet "conduct on the part of the government agents tending to focus the witness's attention on the defendant" is one of the factors to consider in determining the suggestiveness of a pretrial identification. *United States v. Crawford*, 576 F.2d 794, 797 (9th Cir.), *cert. denied*, 439 U.S. 851 (1978). Additionally, although the prosecutor was aware of the victim's initial description of the perpetrator that was contrary to Petitioner's physical characteristics, he asked her no questions to attempt to resolve the discrepancies. The prosecutor was similarly unaware of and did not inquire into the circumstances of the purported photo identification by the victim of the vehicle or the interior of the house. Finally, the court below supported the prosecutor's independent judgment by his averred reliance on the description of the interior of Petitioner's grandparents' house. ("She was without any hesitation about the description of the room"; "her description matched the interior of McSherry's grandparents' home.") This description could only

(Continued on following page)

The causation issue in the Ninth Circuit initially depends on a rebuttable presumption that the prosecutor used independent judgment in filing formal charges. However, this presumption "can be overcome, for example, by evidence that the officers knowingly submitted false information." *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981). Whether evidence rebuts the *Smiddy I* presumption is a factual question that cannot be resolved on summary judgment. *Smiddy v. Varney*, 803 F.2d 1469, 1470 (9th Cir. 1986); *see also Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991) (holding police officers can be liable if they "made false reports to the prosecutor, omitted material information from the reports, or otherwise prevented the prosecutor from exercising independent judgment"); *Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1988) (presumption rebutted by "evidence that the investigating officers made material omissions or gave false information to the prosecutor").

Other circuits establish no presumption of intervening causation and simply apply tort principles of causation in holding defendants in section 1983 cases are liable for the consequences of their acts

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have been suggested or fabricated by Respondent Turley, since the victim was never inside that house. Under these circumstances, Petitioner presented ample evidence from which the jury could conclude the prosecutor did not use independent judgment in filing formal charges against Petitioner.

caused by "reasonably foreseeable intervening forces," *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989). *See also Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1071 (2d Cir. 1997), reinstated after opinion vacated, 173 F.3d 120, 121 (2d Cir. 1999) (decision of a sentencing judge does not break the causal chain between the wrongful recommendation of a probation officer and an unconstitutional sentence); *Wagenmann v. Adams*, 829 F.2d 196, 212-13 (1st Cir. 1987) (decision of court clerk acting as bail commissioner in setting bail did not insulate police officer from liability for violating plaintiff's right to be free from excessive bail); *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988) ("As with the grand jury, . . . the public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false."); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) ("[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial – none of these decisions will shield a police officer who deliberately supplied misleading information that influenced that decision"); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) ("the chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary. Any misdirection of the magistrate or the grand jury by omission or commission

perpetuates the taint of the original official behavior"): *Lanier v. Sallas*, 777 F.2d 321, 324-25 (5th Cir. 1985) (judge's decision to commit plaintiff to mental health facility did not sever chain of causation where that decision was based in part on misrepresentation made by defendants).

Thus, either under the Ninth Circuit rebuttable presumption rule of independent prosecutorial judgment or under general tort causation principles, Petitioner presented ample evidence precluding summary judgment against him on the issue of causation.

This Court should grant certiorari and hold that the tort causation principles mentioned in *Hartman v. Moore*, 547 U.S. at 257 n. 5, include foreseeability of natural and probable consequences which apply to intervening official conduct in a section 1983 non-retaliatory prosecution claim when police officers withhold relevant material information from the prosecutor who files formal charges.

CONCLUSION

As a result of Respondent Turley's unconstitutional fabrication of evidence, coercive and suggestive identification techniques and perjured testimony at trial, Petitioner was wrongfully convicted and served 14 years of a 48-year prison sentence before being fully exonerated of all charges.

The court below on reconsideration of its original decision to reverse and remand the trial court's summary judgment, has upheld a grant of summary judgment against Petitioner based on (a) an unreasonable application of the causation requirement of 42 U.S.C. §1983, (b) a misapplication of *Malley v. Briggs*, 475 U.S. 335, 340 (1986), and (c) a misinterpretation of *Hartman v. Moore*, 547 U.S. 250 (2006) concerning the need to plead and prove absence of probable cause in section 1983 claims other than First Amendment retaliatory prosecution claims.

This Court should grant certiorari to settle these issues and resolve their conflict in the opinions of various circuit courts.

Respectfully submitted,

MARK E. OVERLAND
Attorney for Petitioner
Leonard James McSherry

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEONARD MCSHERRY,

Plaintiff-Appellant,

v.

CITY OF LONG BEACH; LONG BEACH POLICE DEPARTMENT; NORMAN TURLEY, Officer; CARTHEL S. ROBERSON, in his individual and official capacities,

Defendants-Appellees.

No. 06-55837

D.C. No. CV-02-03767-RGK

ORDER AND OPINION

Appeal from the United States District Court for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted
February 14, 2008 – Pasadena, California

Order and Opinion Filed October 20, 2009

Before: Stephen S. Trott, Richard R. Clifton, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Trott

COUNSEL

Mark E. Overland, Overland Borenstein Scheper & Kim LLP, Los Angeles, California, for the plaintiff-appellant.

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ORDER

The Opinion filed March 30, 2009, slip op. 3805, and appearing at 560 F.3d 1125 (9th Cir. 2009), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.

The superseding opinion will be filed concurrently with this order. The parties may file an additional petition for rehearing or rehearing en banc. All other pending motions are denied as moot.

OPINION

TROTT, Circuit Judge:

I

After Leonard McSherry ("McSherry") served almost fourteen years in prison for kidnaping, raping, and molesting a six-year-old girl, he was exonerated by DNA evidence acquired from George Valdespino and Valdespino's subsequent confession to these crimes. McSherry was released from prison pursuant to a writ of habeas corpus issued by the Los Angeles Superior Court. Alleging violations of his civil rights pursuant to 42 U.S.C. § 1983, he then filed suit related to his arrest and conviction against Defendants City of Long Beach, Long Beach Police

Department ("LBPD"), and the officers he claimed were responsible for his faulty conviction, Detective Norman Turley ("Turley"), and Sergeant Carthel S. Roberson ("Roberson").

This appeal follows the district court's plenary grant of summary judgment to Defendants on the basis of qualified immunity. We have jurisdiction, and we affirm. *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1030 (9th Cir. 2004) ("We may affirm the district court's grant of summary judgment on any basis supported in the record.").

II

BACKGROUND

A. Factual Background

1. *The initial descriptions of the suspect and car*

In March of 1988, a six-year-old girl was kidnaped from a playground on a Navy base in Long Beach, California. She was molested and raped by her kidnapper and then released. The abduction was witnessed by her four-year-old brother. Within ten hours of the kidnaping, LBPD patrol officers interviewed her. Initially she described her kidnapper as a short, fat, white male with black hair, who was older than her grandfather. Her brother told police that the man who took his sister was "red in color" and had black hair. Both sister and brother said the suspect made her get into a green car.

Shortly after the victim's return, a neighbor, Robin Davis ("Davis"), reported she had seen a white male, thirty-five years old or older, 5'7"-5'9" tall, heavy, with dark brown to black hair, a mustache, heavy black eyebrows, and a chubby pock-marked face, in the area on the day the victim was abducted. Davis said she saw an unattended 1970's model, dark green, larger model pickup truck with a white cab-over camper in the parking lot by the playground.

2. *Photo and physical identifications of McSherry and the vehicle*

On April 19, 1988, Officer Turley interviewed the victim in the Charter Hospital in Long Beach, California. He showed her a photo line-up that included a suspect named John Larocco. The other photos in the lineup, including McSherry's, were simply "fillers."

McSherry's photo was on file because of his criminal record. On June 16, 1970, McSherry forcibly abducted and sexually molested a six-year-old girl and later pleaded guilty to felony child molestation. On January 15, 1975, McSherry was convicted of lewd and lascivious conduct towards an eight-year-old girl and served four years in state prison. On July 8, 1979, McSherry was convicted of kidnaping a fifteen year-old girl, and served six years before being paroled. In 1986 McSherry was convicted of a misdemeanor involving children and sentenced to county jail. Turley was a witness in that case. McSherry's official record shows that he first registered as a sex

offender in California with respect to children in 1971 and renewed that registration in 1985.

Turley said that because he believed McSherry was still in jail on his 1986 misdemeanor conviction at the time the crime under investigation was committed, McSherry was not a suspect. Unexpectedly, the victim picked McSherry's photo out of the lineup. Later, Turley learned that McSherry had been released early from jail before this crime occurred.

During that same interview, Turley showed the victim pictures of sixteen different campers/trucks to try and determine in what kind of vehicle she had been kidnaped, but she said the vehicle was a car, not a truck. Turley said she seemed confused but could communicate.

On April 21, 1988, Turley re-interviewed the victim. He showed her the same photo lineup as he had shown her on the 19th, but, out of "fairness," in a different order. She again picked McSherry. Turley also showed her photographs of nine cars. She identified a car, and then after Turley asked her if she was sure, she identified a different car. Turley determined that she was confused and told her that he wanted her to look at all of the cars before she told him if she saw the car or not. Turley changed the order of the photographs, and she picked out McSherry's father's yellow station wagon.

On May 16, 1988, Turley and Navy Investigative Officer Tammy Warmack ("Warmack") interviewed the victim's brother. They showed him a photo lineup

of nine vehicles, and he picked out the same car his sister had chosen. He then identified McSherry from a photo lineup.

Subsequently, on July 21, 1988, the victim and her brother were taken at the request of McSherry's attorney to a court-ordered physical lineup. After the lineup was over and she was out in the hallway, she volunteered first to her mother and then to Warmack that the person who took her was number three (McSherry), not number six, as she had written down. She said that she wrote down six because she was afraid. Ten minutes later, she reaffirmed these statements to Roberson. During the same lineup, her brother picked out number four. The victim also positively identified McSherry under oath during a preliminary hearing and later at trial.

Robin Davis picked McSherry's photo out of a lineup on May 18, 1988, the day after McSherry was arrested. This lineup was witnessed by Warmack. Warmack said that Davis' selection of McSherry "appeared independent" (*i.e.*, not coached). Davis selected McSherry again in a later physical lineup, made an in-court identification of him during a preliminary proceeding, and identified him again in court at his trial.

At McSherry's trial, Turley testified that each time he showed photos to the victim, her brother, and Davis, he told them that they did not have to identify anyone, or any particular vehicle. With respect to the victim and her brother, this admonition is reflected in

the police reports. Warmack testified at McSherry's trial that Turley did not make any effort to influence the victim in her selections during the photo lineups.

3. *The descriptions and identification of the house*

Turley and Roberson arrested McSherry for these crimes on May 17, 1988. In her initial interview with police, the victim described the place where she was taken as a white house with two rooms, a bedroom and a bathroom. She said the numbers one and zero were on the door. At some other point, when Turley and Roberson were driving her around, she said that the house was brown.

The day after McSherry's May 17th arrest, Turley and Warmack interviewed the victim again. She picked McSherry's grandparents' home out of a photo lineup, identifying it as the place McSherry had taken her. The grandparents' residence was blue and white. She provided specific details about the room where she had been raped. Warmack said most of the questions were open ended. On the same day, Deputy District Attorney Ken Lamb authorized on behalf of the Los Angeles County District Attorney's Office the filing of a felony complaint charging McSherry with various felonies against the victim.

On May 19th, police served a search warrant at McSherry's grandparents' house. The victim's description generally matched a bedroom in the residence. While executing the warrant, officers noticed a bird in

the living room area, and a barking dog in the backyard. Turley re-interviewed the victim on May 24th and asked if she had heard or seen any animals. She said she heard a bird. He asked her several other questions regarding the interior of the house, and her responses matched details of the residence. Finally, when asked if she saw a phone, she said she saw a white push button phone. McSherry's room contained only a black rotary phone.

B. Procedural History of the Present Case

McSherry brought suit under 42 U.S.C. § 1983, alleging (1) Fourteenth Amendment due process violations for unconstitutional interview procedures; (2) Fourth and Fourteenth Amendment false arrest claims based on false witness identifications; (3) failure to train and supervise; (4) negligent hiring; and (5) supervisory liability. He claimed damages arising from Turley's and Roberson's alleged errors that directly and proximately caused his wrongful arrest, trial, conviction, and incarceration.

In October 2003, on the first day scheduled for trial, the district court granted Defendants' Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50 on the ground of qualified immunity. McSherry appealed. A panel of our court held on procedural grounds that a "district court may not grant a motion filed under Rule 50 prior to the presentation of any evidence in a case . . . because the non-moving party must be afforded the opportunity to present evidence,

and the court must evaluate that evidence. . . ." *McSherry v. City of Long Beach,* 423 F.3d 1015, 1021 (9th Cir. 2005). The panel explained that it was concerned that "McSherry was not provided an adequate opportunity to present evidence in his case. Furthermore, disputed issues of fact evident on the face of McSherry's pre-trial contentions, of fact render judgment as a matter of law on the basis of qualified immunity inappropriate at this time." *Id.* The panel explained also that treating the motion as a motion for judgment on the pleadings, "[t]he facts alleged by McSherry support a claim of deliberate fabrication, and thus, *on the basis of the pleadings,* the defendants are not entitled to qualified immunity as a matter of law." *Id.* at 1021-22 (emphasis added). In a footnote, we said that McSherry "was not informed that he should treat [Defendants' motion] as a motion for summary judgment and provide evidence in support of his claims." *Id.* at 1021 n.4. We remanded to the district court "for further proceedings consistent with this opinion." *Id.* at 1022. We denied McSherry's request that the case be remanded to a different judge. *Id.* at 1024.

On remand, the district court granted summary judgment to Defendants on the ground of qualified immunity. The court held that probable cause existed for McSherry's arrest. It further held that the fabrication of the evidence claim failed because (1) McSherry did not present "any evidence that Defendants deliberately fabricated evidence, or acted in a way that produced false information"; (2) the District Attorney

had conducted an independent investigation of the evidence, and under the totality of the circumstances, there was "no evidence that Defendants knew or should have known that McSherry was innocent"; and (3) McSherry "failed to make or support any factual allegations of any fabrication of evidence . . . that were logically capable of supporting" a claim that Turley used unconstitutionally suggestive interview techniques. Finally, the district court held that the *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), claim against the City and LBPD failed because McSherry did not show a constitutional violation by either Roberson or Turley.

III

DISCUSSION

A. Standard of Review

This court reviews de novo a district court's grant of summary judgment on the ground of qualified immunity. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007). "We may not affirm a grant of summary judgment if there is any genuine issue of material fact or the district court incorrectly applied the substantive law." *Id.* Stripped to its core, our inquiry is "whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In making this determination, we view the evidence in the light most

favorable to McSherry. All justifiable inferences are to be drawn in his favor and his evidence is to be believed. We may affirm on the basis of any ground supported by the record. *San Jose Christian College,* 360 F.3d at 1030.

B. Analysis

1. *Probable cause for the arrest*

McSherry claims that Defendants lacked probable cause to arrest him because they: (1) used suggestive interview techniques; (2) manipulated or coerced witnesses; (3) fabricated evidence; and (4) disregarded exculpatory evidence.

"Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense." *Gausvik v. Perez,* 345 F.3d 813, 818 (9th Cir. 2003) (citing *Beck v. Ohio,* 379 U.S. 89, 91 (1964)). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Brinegar v. United States,* 338 U.S. 160, 176 (1949).

Here, before McSherry was arrested, the victim on two occasions positively identified McSherry as her attacker, and also identified his father's car as the vehicle used to facilitate the crime. Scientific evidence reported by the Sheriff's Crime Laboratory indicated that semen taken from the victim's

underwear could belong to McSherry in that he could not be excluded as the person whose semen was found. Also, McSherry's modus operandi known to the police from previous convictions was similar to the manner in which the victim was abducted and sexually assaulted.

McSherry attempts to undercut probable cause with allegations that the officers violated the Due Process clause of the Fourteenth Amendment by ignoring exculpatory evidence. "A police officer's failure to preserve or collect potential exculpatory evidence does not violate the Due Process Clause unless the officer acted in bad faith." *Cunningham v. City of Wenatchee,* 345 F.3d 802, 812 (9th Cir. 2003).

McSherry claims that Defendants acted in bad faith when they ignored: 1) George Valdespino's arrest for a crime similar to the victim's abduction one week later in a nearby county; 2) the fact that initial identification statements by Davis, the victim, and the victim's brother did not resemble McSherry; and 3) the possibility that Davis's identification was influenced by a newspaper photograph of McSherry. These claims fail.

First, McSherry does not offer any evidence that Defendants knew in 1988 that Valdespino was arrested in a nearby county for a similar crime. Absent such a showing, there is no evidence of bad faith.

Second, as to the descriptions of the perpetrator given by the victim and her brother, police officers

"must be given some latitude in determining when to credit witnesses' denials and when to discount them, and we are not aware of any federal law . . . that indicates precisely where the line must be drawn." *Devereaux v. Abbey,* 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc). Turley and Roberson do not dispute that McSherry did not closely resemble the initial descriptions given by the two children, however, nothing in the record shows that the officers acted in bad faith by relying on the children's photo lineup identification of McSherry rather than their initial descriptions.

Third, with respect to Davis' identification of McSherry in a photo lineup, McSherry argues that Davis was shown a photo lineup after McSherry's picture appeared in the paper, implying that she chose him because she recognized him from the newspaper photo. This bald assertion does not demonstrate bad faith. McSherry does not offer any evidence whatsoever that Davis ever saw the picture, or that she based her subsequent identification on that picture.

Fourth, McSherry's allegations of the use of improper, unreliable and suggestive identification procedures turn out upon examination to be without adequate factual support. Surmise, conjecture, theory, speculation and an advocate's suppositions cannot "do duty for probative facts" and valid inferences. *Poppell v. City of San Diego,* 149 F.3d 951, 962 (9th Cir. 1998).

As for McSherry's allegations of fabrication of evidence, this claim pertains to incidents involving McSherry's grandparents' home as possibly the location of the sexual assault. These matters occurred after McSherry's arrest and are therefore irrelevant to the question of probable cause.

The probable cause to arrest McSherry as well as to hold him to answer for trial was confirmed in a preliminary hearing held before a neutral magistrate where the victim again identified McSherry as her attacker, this time under oath. *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975) ("[W]e hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). Neither Turley nor Roberson testified at this hearing which resulted in the filing of a felony information against McSherry in Los Angeles Superior Court.

"In California, . . . it is a long-standing principle of common law that a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes *prima facie* – but not *conclusive* – evidence of probable cause." *Awabdy v. City of Adelanto,* 368 F.3d 1062, 1067 (9th Cir. 2004) (emphasis in original). We held in *Awabdy* that one way a "plaintiff can rebut a prima facie finding of probable cause is by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id.* To do so, a plaintiff must be "able to prove the allegations in his complaint that

the criminal proceedings were initiated on the basis of the defendants' intentional and knowingly false accusations and other malicious conduct." *Id.* McSherry has not alleged facts sufficient to create a genuine dispute on this issue for reasons discussed in section B.2 of this opinion.

Accordingly, we hold that there exists no genuine issue of material fact regarding probable cause or the legality of McSherry's arrest and detention for trial. Finding no constitutional violation on this issue, we affirm the district court.

2. *Causation*

In *Beck v. City of Upland,* 527 F.3d 853 (9th Cir. 2008), a case decided after briefs were filed and we heard oral argument in this matter,[1] we held that "in any constitutional tort case . . . in which a prosecutor has instigated a prosecution, it is necessary, if not sufficient, that a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution show the absence of probable cause." *Id.* at 865 (citing *Smiddy v. Varney,* 665 F.2d 261 (9th Cir. 1981), and *Hartman v. Moore,* 547 U.S. 250 (2006)). Relying on the Supreme Court's decision in *Hartman,* we said "[a] prosecutor's independent judgment may break the chain of causation between the unconstitutional actions of

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[1] Both parties have now given us their views on *Beck* and *Hartman.*

other officials and the harm suffered by a constitutional tort plaintiff." *Beck,* 527 F.3d at 862. We added that "[p]ut in traditional tort terms, the prosecutor's independent decision can be a superseding or intervening cause of a constitutional tort plaintiff's injury, precluding suit against the officials who made an arrest or procured a prosecution." *Id. See also, Stoot v. City of Everett,* ___ F.3d ___, ___ (No. 07-35425 9th Cir. August 13, 2009) (an intervening decision of an informed neutral decision-maker may break the chain of causation).

In *Beck,* we concluded on the record (1) that Beck was arrested without probable cause, and (2) that the officers had not met their burden to show that the prosecutor's charging decisions acted as an "intervening cause," thus shielding them from liability. *Beck,* 527 F.3d at 870.

On the record in this case, however, the opposite is true. Substantial evidence of probable cause existed for McSherry's arrest and to bind him over for trial. There is no question that the prosecutor's actions in authorizing all charges against McSherry and conducting his prosecution were (1) amply supported by probable cause at all stages of the process, and (2) the result of his independent professional judgment based upon a thorough review of the evidence, a judgment that was predicated on eyewitness identification related to him and uninfluenced by either Turley or Roberson or the "evidence" McSherry claims was fabricated. Because McSherry cannot survive

summary judgment on this critical issue, his related claims must fail.

In the ordinary course of business, Turley took McSherry's case to Deputy District Attorney Ken Lamb, a prosecutor with ten years of previous experience as a police officer. Lamb's declaration filed in support of the officers' motion for summary judgment reads as follows:

DECLARATION OF DEPUTY DISTRICT ATTORNEY KEN LAMB

I, Ken Lamb, declare and state as follows:

1. I am a Deputy District Attorney for the County of Los Angeles, and I was the trial deputy in the case of the *People v. Leonard McSherry,* Case No. A 040264.

2. Before I became a Deputy District Attorney, I was a member of the Los Angeles Police Department for ten years. During my career as a police officer and as a district attorney, I have interviewed over a thousand children, and have now been involved in the investigation of sexual abuse crimes for over eighteen years. I have conducted training seminars on sexual assault crimes, including techniques for interviewing children. Throughout my career, I have prosecuted over 600 felony jury trials.

3. I make this declaration in support of the Defendant's Motion for Summary Judgement. The facts set forth herein are true of my own personal knowledge, except for those

things stated on information and belief, which are believed to be true, and if called upon to testify thereto, I could and would competently do so under oath.

4. Leonard McSherry ("McSherry") was arrested for the kidnap and rape of six year-old [ ] . . . on May 17, 1988. On May 18, 1988, I authorized that he be charged with (1) forcible rape; (2) oral copulation of a person under age 14 and more than 10 years younger; (3) rape by a foreign object; and (4) kidnaping to commit child molestation of a victim under the age of 14.

5. After McSherry's arrest, I reviewed all of the evidence, including the witnesses' identifications, the witnesses' statements, the police officers' statements, the physical evidence, the criminal lab results, and other corroborating evidence, to ensure that there was a case against McSherry.

6. In addition, I reviewed the police reports, the photo lineups, and the live lineups in order to ensure their lawfulness.

7. Furthermore, I interviewed the witnesses in order to verify the information provided to me by the police officers.

8. I personally interviewed [the victim] on more than one occasion. During the interviews, I was convinced by her demeanor and language that she was describing what she remembered from her kidnaping, rather than from any coaching or outside influence.

Based upon my experience with child victims of sexual assault, I further believed that her emotional state was such that it would have been virtually impossible for anyone to have coached her on what to say.

9. I personally interviewed . . . , [the victim's] four year-old brother. There were no indications that anyone had coached him or otherwise inappropriately attempted to influence him.

10. I personally interviewed the adult witnesses, and clearly explained to them that they were to testify only to those things about which they had personal knowledge, and not about anything they might have heard from other sources. Based upon my conversations with the adult witnesses, I believed that they were recounting their personal experiences.

11. Based on my independent investigation, I concluded the photo lineups and the live lineups were not misleading or suggestive. I further concluded that the testimony of the witnesses was of their own recall, and not the result of influence by police officers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 27, 2006, in Los Angeles, California.

SIGNED

Ken Lamb, Declarant

The prosecutor's assertions that he personally made the decision to approve and to file a felony complaint against McSherry and to prosecute the case, and that he did so based solely upon his own independent investigation, were closely tested by McSherry's counsel in lengthy depositions. We have scoured this record to uncover any facts or valid inferences uncovered in those depositions or elsewhere that materially undermine the credibility of Lamb's assertions as to the independence of his judgment and have found none. It is not enough to demonstrate a genuine issue of material fact simply to say, as McSherry has, "McSherry disputes Defendants' factual premise that Lamb used independent judgment." Summary judgment requires facts, not simply unsupported denials or rank speculation. *Poppell,* 149 F.3d at 954. McSherry's statement of genuine issues in opposition to Defendants' motion for summary judgment does no better. At most, the facts relied upon by McSherry take issue with the thoroughness of Lamb's investigation, not the convincing evidence that it was entirely independent. Because this appeal is about the facts in the record, we array them in detail greater than our ordinary practice.

For example, McSherry's counsel asked Lamb, "[t]he circumstances of the original identification by [the victim] . . . as far as you know are based on what Turley said; isn't that right?" Lamb's answer was, "No, I interviewed [the victim] herself. I personally interviewed her." Later, McSherry's counsel pressed the same point, asking Lamb, "So what you know

about that identification [of McSherry] is what has been related to you by Mr. Turley; correct?" Answer, "No, that's not correct. I also know what's been related to me [by the victim]."

Lamb elaborated about the victim's initial identification of McSherry in great detail:

> Q (by counsel for McSherry) And what was it that [the victim] said to you?
>
> A (by Ken Lamb) Throughout various interviews?
>
> Q What do you remember about what she said to you?
>
> A That she referred to the individual who did these acts as "the stranger." She was unable to recall sexual – a great deal about the sexual acts themselves. She remembers going to a house, that in the bedroom there was a photograph of the stranger on the wall, that she was dropped off and went up to some other house, that – I think that would be her initial sort of description about what happened.
>
> Q Okay. Anything else that you remember?
>
> A At some point we talked about the photographic identification. Do you want me to go into that?
>
> Q Yeah.

A Okay, I at some point – I don't recall when – I explained to her that she's not in any trouble, that no matter what she says, none of this is her fault. Kids frequently think that somehow when they get abused, when they get sexually assaulted, that they did something wrong, that it's their fault. I told her you didn't do anything wrong, it's not your fault. I told her that whatever she said, that as long as it was the truth, it didn't matter, she wasn't going to get into any trouble.

We would have had some conversation about – to make sure that she understood what it meant to tell the truth. In my mind – she was a child. When I interview kids, I rate them on a one to ten scale. On their ability to communicate her biggest problem was that she could communicate about portions of things that had happened, but there were areas that she was totally blank on. The best example I can give of that is what I did in closing argument was I broke up a record album. You might be young enough that you don't know a record album, but I broke it and I held up pieces. She was – it was like trying to put a record album back together. There were pieces that you could hear, but then there would be spots missing. She came across in that way.

She was afraid. I told her that nothing was going to happen to her, that if she didn't remember something, it was okay. There were no wrong answers. We talked about – I

tried to get some information about the stranger. She was really not very able to give information other than stranger. I asked her if she had seen photographs of which she said and that the stranger was one of them. I told her if she was guessing, that she didn't have to guess. If there was nobody there, she could say that. There was no wrong answers.

And she told me that she identified the stranger, that he was in a photographic line-up, that his picture had been on the wall in the house. I think that's the extent of how the conversations would have gone. I don't believe that they got – as we progressed through the conversations up to the trial, I don't believe that they got much more in detail things.

* * *

Q When you had a conversation with her about what it meant to tell the truth, what did you say to her?

A I asked here [sic] if she understood that it was important that she tell the truth. She said yes, and I said – I held up a pen or something and I said if this was a yellow pen and it was a black one (sic), would that be the truth, and she said no, and I'm giving that example. That's not the – I'm not citing word for word. I'm doing some sort of description like that, some item. If I said it was a black pen it would be the truth; yes. I said what do you think would happen if you told me that it was not the truth, like the

black pen was yellow when it really wasn't. She said she would be in trouble, and I said do you understand that if people tell you what to say, it doesn't matter, tell the truth. If someone else has told you what to say in the past – one of the tests that I use – and again, I don't want to mislead you. This is general things that I do. I can't give you specific word for word of what happened.

I give kids the example after they're done talking – I let them talk. I try not to give them suggestions or say things to them. At some point I will then say, well, what if your mother told me that, an example, that you were in a bathtub and these things happened to you. When kids tell me, oh, yeah, I remember that, I'll go into that conversation with them. That's not good. That tells me that they're very easily influenced and that they're probably not going to be a very good witness. Other kids who are on the other end and say if mom told you that, she's wrong, that's not what happened, I know that they're going to be a good witness, and we had conversations to that type of extent because in my mind it's important kids understand they're not going to be in trouble, and that they don't – there's no one they have to please I guess is the best way to put it.

* * *

A She was without any hesitation that the stranger was in fact the person that she identified which I knew to be, now know to

be, McSherry. She was without any hesitation about the description of the room. She was very – had extreme difficulties in discussing the sex aspects of the crime. Those are the areas that I know.

The victim herself corroborated in her deposition the officers' and Lamb's recitations of her multiple positive identifications of McSherry.

Q (by counsel for the Defense) Were you told that you didn't have to pick out anybody if the person wasn't there?

A (the victim) Yes.

Q Were you then shown the photographs?

A Yes.

Q Did you pick out somebody?

A Yes.

Q Okay. Now, as to that somebody, did you ultimately pick that somebody out of the live line-up?

A Yes.

Q And did you ultimately identify that same somebody in a courtroom at a trial in Long Beach?

A Yes.

Q Who was that somebody?

A Mr. McSherry.

Q And is that the person that you picked out on your own when you were first shown the photographs?

A Yes.

Q And was that the same person you identified in the courtroom?

A Yes.

Q And were you being honest at the time on all three occasions?

A At the time, yeah.

Q When you picked out the photograph of McSherry, did you honestly believe it was McSherry who had done this to you?

A Can you say that again.

Q Yeah. When you first picked out the picture of McSherry at a hospital, did you believe at that time McSherry was the individual who had done this to you?

[objection by counsel]

A Yes.

Q Your answer is yes?

A Yes.

Q When you told them at the live lineup whether it was in the room or just outside the room that it was McSherry, was that a truthful statement?

[objection by counsel]

A Yes.

Q Yes?

A Yes.

Q And when you identified him in court, was that a truthful statement?

A Yes.

Q And the "him" you identified in court was who?

A McSherry.

As for Lamb's acceptance at face value of the police reports, he said this:

Q (by counsel for McSherry) And the evidence that you have is the evidence that's given to you by the police officers in the case; correct?

A (by Ken Lamb) No, because I interview witnesses. It's coming directly from the witnesses.

* * *

McSherry's counsel probed Lamb during his deposition for evidence of bias against a suspect in a sexual assault case. He found none.

Q (by counsel for McSherry) And is the ultimate goal to obtain a conviction within those parameters?

A (by Ken Lamb) No.

Q What is the ultimate goal?

A Is to examine the evidence in a fair and equitable manner. It's no – it's just as good if somebody who is accused of a crime you determine isn't guilty than it is that if you have the evidence and you convict somebody. I don't believe a prosecutor or deputy district attorney's role is ever as if it's a game and you have to win. You win – if it turns out somebody is innocent, you win. If it turns out somebody is guilty, then that's an appropriate win, too.

Q That's a pretty good job, you win no matter what.

A That's why I like it.

We also find it noteworthy that McSherry was offered a DNA test by the prosecution before trial, and he declined, preferring instead to go to trial without delay. Lamb testified that he was willing to waive time to allow the DNA test to be performed, but that McSherry was not.

At the core of McSherry's substantive constitutional claims as well as his rejoinder to the issue of causation is the assertion that the officers' allegedly improper conduct materially influenced the prosecutor's decision to file charges against him and to pursue a conviction. In this regard, McSherry relies in large measure on (1) a discrepancy between the victim's initial description of her attacker and McSherry, (2) allegedly flawed identification procedures used by Turley, and (3) what Turley said about the victim's incriminating description of the

interior of the house where she was assaulted, which was at odds with the facts as well as denied by the victim 14 years later. McSherry argues specifically that "Lamb's 'independent investigation' was tainted by Defendant's fabricated evidence and unconstitutionally suggestive interview procedures and techniques." This, of course, could be a valid claim – if McSherry had facts to back it up. *See Borunda v. Richmond,* 885 F.2d 1384, 1390 (9th Cir. 1988); *Barlow v. Ground,* 943 F.2d 1132, 1136-1137 (9th Cir. 1991).

We recognize that McSherry presented evidence to support one of his contentions, notably that one of the police officers may have fabricated evidence against him. In support of that claim, McSherry pointed in particular to the description of the interior of his grandparents' residence and argues that: 1) he provided Turley a detailed description of his grandparents' house after he was arrested; 2) Turley interviewed the victim the next day, then later documented in his police report and also testified at trial that the victim provided a detailed description of the interior of the residence during that interview; 3) the victim's detailed description differed from her initial description but matched the grandparents' residence; 4) after Turley searched the house, he reported that the victim provided another description with more matching details; 5) albeit fourteen years after she was kidnaped, the victim denied giving the descriptions that Turley documented and testified to; and 6) because McSherry was exonerated of the

crimes and another party confessed, the victim obviously was never in the residence and could not have provided such a detailed description.

But McSherry's presentation fell short and failed to raise a genuine issue of material fact as to whether the alleged fabrication or any misconduct by Defendants caused his arrest, prosecution, and conviction. As described above, there was probable cause to justify McSherry's arrest and prosecution. In addition, even examining the evidence in the light most favorable to McSherry, the evidence presented before the district court was simply insufficient to sustain a finding that Lamb's investigation and decision making was not independent and was tainted by the alleged fabrication of evidence. Again, we refer to Lamb's lengthy deposition where he was repeatedly challenged on these issues.

> Q (by counsel for McSherry) Do you remember anything else other than what you've told us about your independent conversation with [the victim]?
>
> A (by Ken Lamb) I may have mentioned it already, I don't know, but my telling her it was important to tell the truth. Part of the interviewing of her was to evaluate whether or not she was a competent witness and could actually communicate and testify, so I was looking for that, and the only other thing would be looking to see other things that she was saying that were issues that I call red flags I would have had to address or deal with.

Q Do you remember anything else?

A No.

Q You stated here, "The evidence is reviewed to ensure that there is not a bias or unfair inference placed upon witnesses." What do you mean by that?

A When I'm looking at a case, I'm trying to do a couple of things. Obviously if there's evidence that shows that somebody didn't commit the crime, I don't want that evidence to be ignored, and second, I need to make sure that we have evidence that will stand up in court, a jury will hear it and say, yes, beyond a reasonable doubt I believe this person committed this crime. In order to do that I try to think and look for things that a defense attorney representing somebody will argue. Whether they're, one, meritorious or have any value doesn't mean, with all respect to the defense attorneys, that they're not going to still argue it, so if there's something that even if it's not there – example, if a police officer says I saw this person drop a gun, there may be no evidence that that officer is lying, but the defense is going to argue how can you trust the police officer's testimony, so you have to be alert for those things, and in evaluating a case I'm looking to see if there's any indications or evidence that a defense attorney is going to raise questions about. *In this case there was a huge red flag immediately, and that was how Mr. McSherry's photograph was identified.*

Q When you say "The evidence is reviewed," are you saying that this is what you did with respect to Mr. McSherry's case?

A Correct.

Q And when you say, "The evidence is reviewed," what evidence are you talking about? Are you talking about the police reports that are presented to you by the police department?

A No, I'm talking about all of the – let's make sure we're talking about a time frame here. Back then I'm talking about statements by witnesses, physical evidence that you have, statements by police officers, any evidence that's going to be presented in court.

Q And when you look at this evidence are you looking at the formal police reports, are you looking at the officers' notes, what are you looking at?

A I'm looking at whatever I have which would be police reports, statements of witnesses, interviews with witnesses or victims, physical evidence, testing of physical evidence and results of that, whatever evidence I have that could find its way into court.

Q *And the evidence that you have is the evidence that's given to you by the police investigators in the case; correct?*

A *No, because when I interview witnesses, it's coming directly from the witnesses.*

Q Other than your own independent investigation?

A No, because it could come from crime lab people, not police officers.

Q Other than that? Whatever investigations the police officers have done and they present it to you –

A Right.

Q – do you independently search for any documents relating to that investigation that they've done, or do you rely on the documents that they give to you?

A I'm sorry, I don't understand the distinction you're trying to make.

Q Okay. Let's say I'm an investigator on [this] case.

A Right.

Q And I go to you and I say here, Mr. Lamb, I want the charges filed and here are the reports on this case, and I give you the reports in this case. You then review those reports and you make a determination. Do you then say, well, do you have anything else in connection with this case, do you have any notes, do you have any other reports, do you have something else that you haven't given me?

A Yes, and frequently –

Q Did you do that in this case?

A Yes, and frequently direct them to do other things.

Q And were you given what to your satisfaction was all the reports that they had in connection with the McSherry case?

A Yes.

Q Were you given all their handwritten notes to your satisfaction?

A At some point, yes.

Q And did you review all those?

A Yes.

Q Now you say here, "The photo line-ups and live line-ups were not misleading or suggestive." What photo line-ups are you talking about?

A The photo that I refer to as the six-pack of McSherry.

Q Any other photo line-ups?

A There were – I believe there were some photo line-ups of the vehicle, and possibly – well, I'm not positive there were any of the house. I think it was just the vehicle.

Q And what did you do to determine that the photo – let's talk about them in

terms of show-ups – that the photo show-ups of the individuals were not suggestive?

A I looked at the photo line-ups.

Q And?

A They weren't suggestive.

Q And what criteria did you use to determine that they weren't suggestive?

A Well, for example, if you're trying to identify or eliminate an African-American and you put his photo in with five male Caucasians, that's the argument and there's a distinction here again. Now we're talking about what will happen in a trial versus the reality aspect. The argument is that's going to be highly suggestive. I'm not commenting on whether that's true or not true, but that's the argument.

Q I'm sorry to interrupt you. Maybe you didn't understand my question. My question is not a general question. My question is with respect to the six-pack in this case, in the McSherry case, what criteria did you use to determine that that six-pack was not suggestive?

A That's what I'm explaining. I looked at the photographs and made sure that if you were showing somebody these photographs without any knowledge of who they were supposed to be looking for, would anybody be picking a specific photograph for whatever reasons. Did the officers tell me or write

anything that suggested in any way that the photographic line-up could be questioned. For example, if someone showed me your photograph by itself and they said is this the person who was asking you questions in the deposition, well, the answer would be yes, but there still could be the argument of, see, that was suggestive because they only showed one photograph. Doesn't change that it's actually the truth, but that argument could exist, so that's what I mean by looking at the photographs and determining that.

Q But that didn't exist in this case because there were six photographs.

A Correct.

Q So we're not dealing with a single photograph being shown.

A I understand.

Q What was it about this particular six-pack that lead you to believe that it was not suggestive in any way?

A I didn't see – if you didn't know that McSherry was involved in a case, I didn't see any photographs that if you showed it to general people the consensus would be they would be picking the same photograph because something stood out in that photograph, nor did I have any information to lead me to believe that contrary to – let's assume you get past that stage, that the photographs are okay, that something else was occurring that made people pick the same photograph.

Q What was the description that the witnesses gave of the individual who had kidnapped [the victim]?

A I don't know exactly. I am aware that it was not fitting of McSherry.

Q *In your conversations with [the victim], were you aware of the description that she had given of the individual?*

A *Yes.*

Q *And were you aware that it didn't fit Mr. McSherry?*

A *Yes.*

Q And did you talk to [the victim] about the difference between that description and her identification of Mr. McSherry?

A I wouldn't say it that way because it would be too suggestive. I would say it more on when you looked at the photographs, are you certain that the person you picked was the stranger.

Q My question was did you talk to [the victim] at all about her initial description of the individual?

A No.

[Break in the deposition]

Q Mr. Lamb, we were talking before the lunch break about Exhibit 1022 which is your Rule 26 report, and in there you state if you look at the paragraph that says

"Information relied upon by the Expert," the last sentence you say, "The testimony of witnesses was cross-checked with other information to ensure that there was corroboration." What other information are you referring to?

A Witnesses corroborate other witnesses, events that were corroborated by – for example, [the victim's] description of the house. There was a house that had a room with that description. Things like that.

Q Anything else that you mean by that?

A Other than evidence corroborating evidence and witnesses, no.

Q When you say "corroboration," are you talking about whether the testimony of the witnesses corroborated each other?

A Sure, that's one way of corroboration.

Q What other – other than that, other than testimony corroborating, what other aspects of corroboration did you mean to include with the word "information"?

A When [the victim's] description of a room where these events took place meets a description of a room that's found that fits that description, that's corroboration of her testimony.

Q Did you ever talk to [the victim] about the original description that she had

given about the place where she had been taken and raped?

A No. What I would ask her is what can you tell me about the place. Now if that's asking her about her original description, that would be, I guess, a yes, but I wouldn't tell her details, if that's what you're asking. I'm not sure.

Q *Well, you were aware that she had originally given a description of the place to where she had been taken; correct?*

A *Correct.*

Q *You were aware of that description; correct?*

A *Correct.*

Q Did you ever ask her anything about that original description that she gave?

A If there were issues that were contradictory, I may have very well asked her about it without giving her – letting her give me the information first, and then saying could it have been this or this instead, or do you recall saying something like this to somebody else.

Q *Did you feel that there were any, as you say, issues that were contradictory?*

A *Yes, I believe there were description contradictions, but not that she was giving to me, if that's what you're asking.*

Q Well, I'm not sure I understand your question. You say that you believe that there were description contradictions?

A *I believe that from the initial reports the description of the suspect and the description of the location would be somewhat contradictory to what she was now telling me.*

Q And my question is did you attempt to resolve those contradictions by asking her questions concerning the contradictions?

A Yes.

Q And what did you ask her?

A I don't recall.

Q *How were the contradictions resolved in your own mind?*

A *From talking to [the victim], the information that she was telling me I believed over things that were in the reports.*

Q Are you saying you did not believe that she had originally given the description contained in the reports?

A No, I'm saying that whether she gave them then or didn't give them, I didn't believe that they were accurate.

Q Why?

A Because I'm talking to [the victim] and she's telling me information.

Q Any other reason other than that?

A Well, the information that she's telling me is then corroborated by other information.

Q Which is what?

A Robin Davis, her brother, the location, the description of the location.

* * *

Q Did you personally attempt to establish the veracity or credibility of any of the reports that were prepared by police officers?

A Yes.

Q How did you do that?

A By personally interviewing the witnesses myself.

Q In interviewing the witnesses yourself was your purpose to try to determine the veracity of the police reports?

A I would phrase it differently because it seems to imply that I had some question about the veracity. I had nothing that lead me to believe that there was a problem other than I had to focus on the photo line-up because of how – the uniqueness of it, because of the way the person was selected, being a filler, not having a reason why he was in the line-up, but I would have been examining those areas so that they would not have been trial issue areas.

> Q When you say "so that they would not have been trial issue areas," what do you mean?
>
> A Well, I want to make sure that when a witness is on the stand and I say thinking back to that day and that time and looking at the defendant here, are you absolutely certain it's that defendant, that their answer is yes and that they weren't influenced by anybody to say yes, and that on the stand they're not going to be telling me things that I should have known before they were testifying.

(emphases added).

Against this record, McSherry has put forward insufficient facts and evidence to proceed past summary judgment. The record is devoid of any information, facts, or valid inferences that might undermine the prosecutor's testimony. In fact, the evidence – including the victim's continuing affirmation of her identification of McSherry as her attacker – supports Lamb's deposition testimony. Accordingly, this case is particularly distinguishable from *Borunda* and *Barlow* where the prosecutors relied only on police reports in making their decision to file charges. *See Borunda,* 885 F.2d at 1390; *Barlow,* 943 F.2d at 1136-37. In the words of *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 252, this case is manifestly so "one-sided" that it need not be submitted to a jury.

McSherry argues also that Turley is liable for his allegedly false trial testimony regarding the

descriptions of the interior of the residence. This claim is foreclosed by *Briscoe v. LaHue,* 460 U.S. 325, 326 (1983) (holding that police officers are immune from liability under 42 U.S.C. § 1983 for perjured testimony).[2]

3. *Monell claims*

Because McSherry has no case against the officers, and because he tenders no facts other than their alleged personal misdeeds as evidence of a policy statement, ordinance, regulation, decision, custom, usage, or practice of either the City of Long Beach or the Long Beach Police Department that caused his injury, *see Poppell,* 149 F.3d at 970-71, his *Monell* claim also fails as a matter of law. *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."); *Scott v. Henrich,* 39 F.3d 912, 916 (9th Cir. 1994) ("While the liability of municipalities

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[2] McSherry relies on *Harris v. Roderick,* 126 F.3d 1189, 1198-99 (9th Cir. 1997) for the proposition that Turley is not entitled to immunity because he initiated the prosecution. We do not find this argument persuasive. *Harris* holds that if officers "functionally served as complaining witnesses who may be said to have initiated [the] prosecution they are not entitled to absolute immunity for their false statements." *Id.* In *Harris,* unlike the case at bar, there were no other complaining witnesses, only the officers. Here, the victim served as the complaining witness.

doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights."); *Jackson v. City of Bremerton*, 268 F.3d 646, 653-654 (9th Cir. 2001) ("Neither a municipality nor a supervisor . . . can be held liable under § 1983 where no injury or constitutional violation has occurred."). This case is distinguishable from cases such as *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994), where the City of Los Angeles maintained an explicit policy involving the use of biting police dogs, one of which allegedly inflicted excessive force upon the plaintiff.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEONARD MCSHERRY,

Plaintiff-Appellant,

v.

CITY OF LONG BEACH; LONG BEACH POLICE DEPARTMENT; NORMAN TURLEY, Officer; CARTHEL S. ROBERSON, in his individual and official capacities,

Defendants-Appellees.

No. 06-55837

D.C. No. CV-02-03767-RGK

OPINION

Appeal from the United States District Court for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted
February 14, 2008 – Pasadena, California

Filed March 30, 2009

Before: Stephen S. Trott, Richard R. Clifton, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Trott

COUNSEL

Mark A. Borenstein, Overland Borenstein Scheper & Kim LLP, Los Angeles, California, for the plaintiff-appellant.

Michael M. Mullins and Nowland C. Hong, Akerman Senterfitt LLP, Los Angeles, California, for the defendants-appellees.

OPINION

TROTT, Circuit Judge:

This case is before us for the second time.[1] In this appeal, Leonard McSherry appeals the district court's order granting summary judgment on the ground of qualified immunity to the City of Long Beach ("City"), Long Beach Police Department ("LBPD"), Officer Norman Turley, and Sergeant Carthel S. Roberson. The allegations in this case stem from a kidnaping, rape, and molestation that occurred in Long Beach, California, in March of 1988. After McSherry served almost fourteen years in prison for these crimes, he was exonerated by DNA evidence and a confession by the actual perpetrator. McSherry then brought this suit, alleging violations of his civil rights pursuant to 42 U.S.C. § 1983.

McSherry argues that Defendants violated his civil rights by: 1) fabricating the victim's descriptions of the interior of the home where the rape occurred; 2) fabricating the victim's identification of the vehicle used in the kidnaping; 3) coercing the victim's

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[1] The first decision, *McSherry v. City of Long Beach*, ("*McSherry I*"), is reported at 423 F.3d 1015, 1016 (9th Cir. 2005). It reviews in greater detail the facts leading to McSherry's arrest and conviction.

identification of McSherry as the perpetrator; 4) ignoring exculpatory evidence; and 5) arresting McSherry without probable cause. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part, vacate in part, and remand.

We conclude that genuine issues of material fact exist as to whether Turley deliberately fabricated evidence. *See Devereaux v. Abbey,* 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). Accordingly, we reverse and remand this claim against Turley, but affirm the district court with respect to all other claims against him. Because the district court dismissed the *Monell v. Dep't of Soc. Servs. of New York,* 436 U.S. 658 (1978), claim against the City and LBPD only because McSherry did not show a constitutional violation at the hands of Turley or Roberson, and these defendants did not assert any other ground for dismissal on appeal, we vacate and remand the claim. We affirm the district court's grant of summary judgment to Roberson on all claims. We deny McSherry's request for reassignment to a different judge for the reasons we articulated in *McSherry I.*

I

BACKGROUND

This appeal comes to us following remand to the district court after we determined that the district correct incorrectly granted judgment as a matter of law to Defendants on the first day of the trial. *McSherry I,* 423 F.3d at 1022. On remand, the district

court granted summary judgment to Defendants on the ground of qualified immunity. The district court held that probable cause existed for McSherry's arrest. It further held that the fabrication of the evidence claims against Defendants failed because: 1) McSherry did not present "any evidence that Defendants deliberately fabricated evidence, or acted in any way that produced false information"; 2) District Attorney Ken Lamb conducted an independent investigation of the evidence; and 3) McSherry "failed to make or support any factual allegations of any fabrication of evidence . . . that were logically capable of supporting" a claim that Turley used unconstitutionally suggestive interview techniques. The district court held also that the *Monell* claim against the City and LBPD failed because McSherry did not show a constitutional violation by either Roberson or Turley.

The issues now before us arise out of the following facts. In March of 1988, the six-year-old victim was kidnaped from a playground on a Navy Base in California. The perpetrator raped and molested her before releasing her several hours later. According to police reports, the victim and her four-year-old brother, a witness to the kidnaping, both provided descriptions of the suspect to the police. Several weeks later, Turley showed both children a photo lineup separately, and both identified McSherry as the perpetrator. Turley's police reports indicate that he showed the victim and her brother photos of cars. Both selected a yellow Mazda station wagon belonging to McSherry's father, identifying it as the vehicle

used in the abduction. After McSherry's arrest, an adult witness, Robin Davis, picked McSherry out of a lineup, identifying him as a person she had seen in the area on the day of the kidnaping.

McSherry was arrested for the crime on May 17, 1988. According to police reports, Turley and Roberson interrogated McSherry, and he provided a detailed description of the interior of his grandparents' residence. On May 18, the day after McSherry's arrest, Turley and Navy Investigative Officer Tammy Warmack interviewed the victim to obtain a description of the place she had been taken. Turley's report documenting this interview states that the victim picked McSherry's grandparents' home out of a photo lineup, identifying it as the place McSherry had taken her. The report lists specific details allegedly provided by the victim about the room where she had been raped, including: descriptions of 1) a picture of the kidnapper on the wall; 2) a small brown television sitting on a gray dresser; 3) a small, possibly twin size bed, with blue sheets and a white blanket; 4) a black chair; and 5) a mirror alongside the door.

On May 19, Turley and Warmack served a search warrant at McSherry's grandparents' house. Turley's subsequent police report states that the victim's description provided on May 18, matched a bedroom in the residence. Furthermore, according to the report, while executing the warrant officers noticed a bird in the livingroom area and a barking dog in the backyard.

On May 24, following the execution of the search warrant, Turley and Warmack re-interviewed the victim to determine if she could provide a more detailed description of the location where she was taken. During [illegible] interview, the officers asked if she had heard or seen any animals at the place she was taken. According to Turley's report, the victim said she heard a bird. Turley asked her several other questions regarding the interior of the house, and the victim's responses matched details of the interior of the residence. Specifically, according to Turley, the victim gave the following additional details: 1) the room had one door that folded up and one door that swung open; 2) the mirror was big and round; 3) the picture of the kidnapper was round and hanging on the same wall where the television was located; and 4) the room had a window with a seat.[2]

Turley testified at trial, again attributing the descriptions of the interior of the residence to the victim. Also at trial, the victim and Davis identified McSherry as the perpetrator. Medical evidence indicated that McSherry was a possible donor of the semen taken from the victim's underwear.

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[2] According to Turley's report, although the victim said also that there was a white push button phone in the bedroom, officers only observed a black rotary phone in the room. Turley stated in his report that the investigators believed the victim may have been remembering the phone in the house where the kidnapper released her.

Following the trial, McSherry was convicted of the crimes. In December of 2001, nearly fourteen years into his forty-eight-year to life sentence, McSherry was exonerated by DNA evidence. The DNA revealed that George Valdespino had committed the crime. Valdespino later confessed.

II

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment on the ground of qualified immunity. *Blankenhorn v. City of Orange,* 485 F.3d 463, 470 (9th Cir. 2007). "We may not affirm a grant of summary judgment if there is any genuine issue of material fact or the district court incorrectly applied the substantive law." *Id.* All justifiable inferences are to be drawn in favor of the non-moving party and his evidence is to be believed. *Id.*

III

DISCUSSION

"Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). Qualified immunity is a two-part test. We must determine whether, taken in the light most favorable to McSherry, Defendants' conduct amounted to a constitutional violation, and, if so, we must determine whether or

not the right was clearly established at the time of the violation. *Id.* at 201 We may address the prongs in the sequence we see fit. *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 818 (2009).

A. Fabrication of Evidence

1. *Turley*

In support of his claim that officers deliberately fabricated evidence, McSherry points in particular to the description of the interior of his grandparents' residence and argues that: 1) he provided Turley a detailed description of his grandparents' house after he was arrested; 2) Turley interviewed the victim the next day, then later documented in his police report and also testified at trial that the victim provided a detailed description of the interior of the residence during that interview; 3) the victim's detailed description differed from her initial description but matched the grandparents' residence; 4) after Turley searched the house, he reported that the victim provided another description with more matching details, 5) fourteen years after she was kidnaped, the victim denied giving the descriptions that Turley documented and testified to; and 6) because McSherry was exonerated of the crimes and another party confessed, the victim obviously was never in the residence and could not have provided such a detailed description.

The victim's deposition creates a genuine issue of material fact as to whether Turley fabricated evidence. She denied providing the detailed description

of the residence ascribed to her by Turley. Specifically, the victim said she did not tell police there was a picture on the wall because there was not one. She also denied telling the police that there were blue sheets and a white blanket on the bed. When asked whether she had told police that there was a folded up door in the room where she was taken, she said "No. There was no way that a five-year-old can actually remember everything in the house. I mean that's too much for a five-year-old. There's no way. That's too much information in a house for a five-year-old to describe." She denied also telling police that there was a window seat, that she heard a bird, or that there was a circular mirror. That Turley included that information, attributed to the victim, in his reports means there are genuine issues of material fact as to whether Turley fabricated the descriptions. Credibility is an issue for the trier of fact.

As a result, Turley is not entitled to qualified immunity. If the evidence was fabricated, Turley violated McSherry's "clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux*, 263 F.3d at 1074-75. Consequently, we reverse the judgment of the district court as to this claim that Turley deliberately fabricated evidence. At trial, McSherry may support his deliberate fabrication claim with evidence that Turley "used investigative techniques that were so coercive and abusive that [he] knew or should have known that those techniques

would yield false information." *Id.* at 1076. McSherry may present direct or circumstantial evidence, including evidence about identifications of McSherry by the victim, the victim's brother, and an adult witness, and identifications of McSherry's father's car by the victim and the victim's brother.

McSherry argues also that Turley is liable for his allegedly false trial testimony regarding the descriptions of the interior of the residence. This claim is foreclosed by *Briscoe v. LaHue,* 460 U.S. 325, 326 (1983) (holding that police officers are immune from liability under 42 U.S.C. § 1983 for perjured testimony).[3]

2. *Roberson*

We hold that no genuine issue of material fact exists as to whether Roberson fabricated evidence. There are no police reports by Roberson in the record attributing the allegedly fabricated descriptions of the interior of the residence to the victim. Roberson

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[3] McSherry relies on *Harris v. Roderick,* 126 F.3d 1189, 1198-99 (9th Cir. 1997) for the proposition that Turley is not entitled to immunity because he initiated the prosecution. We do not find this argument persuasive. *Harris* holds that if officers "functionally served as complaining witnesses who may be said to have initiated [the] prosecution they are not entitled to absolute immunity for their false statements." 126 F.3d at 1199. In *Harris,* unlike the case at bar, there were no other complaining witnesses, only the officers. Here, the victim served as the complaining witness.

did not participate in the interviews with the victim, nor did he participate in serving the search warrant at the residence. Furthermore, nothing in the victim's deposition testimony indicates that Roberson attributed fabricated descriptions of the residence to her.

3. *Monell* Claim against the City

Under the *Monell* doctrine, McSherry may recover from the City and LBPD if his injury was inflicted pursuant to city policy, regulation, custom, or usage. *See Monell,* 436 U.S. at 690-91, 694. The district court dismissed the claims against the City and LBPD only because McSherry did not show a constitutional violation at the hand of Turley or Roberson, and the City and LBPD did not present any other argument in support of the judgment in favor of the City and LBPD. Based on our determination that there is a genuine issue of material fact as to whether Turley committed a constitutional violation, and because the defendants have not asserted any other ground for dismissal on appeal, we vacate and remand the *Monell* claim against the City and LBPD.

B. Exculpatory Evidence

McSherry argues also that Defendants violated the Due Process Clause of the Fourteenth Amendment by ignoring exculpatory evidence. "A police officer's failure to preserve or collect potential exculpatory evidence does not violate the Due Process

Clause unless the officer acted in bad faith." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 812 (9th Cir. 2003).

McSherry claims that Defendants acted in bad faith when they ignored: 1) Valdespino's arrest for a crime similar to the victim's abduction one week later in a nearby county; 2) the fact that initial identification statements by Davis, the victim, and the victim's brother did not resemble McSherry; and 3) the possibility that Davis's identification was influenced by a newspaper photograph of McSherry. These claims fail. First, McSherry does not offer any evidence that in 1988 Defendants knew that Valdespino was arrested in a nearby county for a similar crime. Absent such a showing, there is no evidence of bad faith.

Second, as to the descriptions given by the children, Defendants "must be given some latitude in determining when to credit witnesses' denials and when to discount them, and we are not aware of any federal law . . . that indicates precisely where the line must be drawn." *Devereaux*, 263 F.3d at 1075. Defendants do not dispute that McSherry did not resemble the initial descriptions given by the two children, however, nothing in the record shows that Defendants acted in bad faith by relying on the children's photo lineup identification of McSherry rather than their initial descriptions.

Third, with respect to Davis' identification of McSherry in a photo lineup, McSherry argues that

Davis was shown a photo lineup after McSherry's picture appeared in the paper, implying that she chose him because she recognized him from the newspaper photo. This evidence does not prove bad faith because McSherry must "'put forward specific, nonconclusory factual allegations' that establish improper motive." *Jeffers v. Gomez,* 267 F.3d 895, 907 (9th Cir. 2001) (per curiam) (quoting *Crawford-El v. Britton,* 523 U.S. 574, 598 (1998)). McSherry does not offer any evidence that Davis ever saw the picture nor that she based her subsequent identification on that picture. Furthermore, because Davis selected McSherry's picture from the lineup, we do not find bad faith on the part of Defendants in relying on this identification rather than her initial description.

C. Probable Cause

McSherry claims that Defendants had no probable cause to arrest him because they: 1) fabricated evidence; 2) used suggestive interview techniques; 3) manipulated or coerced witnesses; and 4) disregarded exculpatory evidence. "Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense." *Gausvik v. Perez,* 345 F.3d 813, 818 (9th Cir. 2003) (citing *Beck v. Ohio,* 379 U.S. 89, 91 (1964)).

We have already determined that there are no genuine issues of material fact as to whether Defendants used improper interview techniques or ignored

exculpatory evidence. Even if the description of the interior of the residence was fabricated, Defendants had probable cause for the arrest. Here, the victim and her brother identified McSherry as the perpetrator and his father's car as the vehicle used to perpetrate the crime. Medical evidence indicated that semen taken from the victim's underwear could belong to McSherry. We hold that these facts established probable cause for the arrest. *See id.*

D. Independent Investigation by District Attorney Lamb

Defendants argue that they cannot be held liable for any damages McSherry suffered after the district attorney filed charges against him. We disagree. "[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981). The presumption may be rebutted if McSherry met his burden of showing that "officers knowingly withheld relevant information with the intent to harm [him], or that the officers knowingly supplied false information." *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986).

In this case, the presumption may be rebutted because, if Turley fabricated evidence regarding the victim's description of the interior of the residence, he

knowingly supplied false information to Lamb. We hold that the investigation and filing of charges by District Attorney Lamb does not insulate Defendants from liability.

IV

CONCLUSION

Because genuine issues of material fact exist as to whether Turley fabricated evidence, we reverse the grant of summary judgment as to Turley on this claim and vacate and remand the grant of summary judgment on the *Monell* claim against the City and LBPD. We affirm the district court's grant of summary judgment to Roberson on all claims, and to Turley, the City, and LBPD on all remaining claims.

AFFIRMED in part, **REVERSED** in part, **VACATED** in part, and **REMANDED**.

The parties shall bear their own costs of this appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEONARD McSHERRY, Plaintiff, v. CITY OF LONG BEACH, LONG BEACH POLICE DEPARTMENT, in his individual and official capacities, SERGEANT CARTHEL S. ROBERSON, in his individual and official capacities, and DOES 2 through 10, inclusive, Defendants.	CASE NO. CV 02-3767 RGK (MANx) **JUDGMENT** (Filed May 31, 2006)

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

The Motion for Summary Judgment ("Motion") by Defendants City of Long Beach ("City"), Long Beach Police Department ("LBPD"), Officer Norman Turley ("Turley"), and Sergeant Carthel S. Roberson ("Roberson") (collectively "Defendants") was taken under submission by the Honorable R. Gary Klausner, District Judge Presiding. The Court, after fully considering the issues and evidence presented by the Motion, including all written argument and other paper in support and in opposition thereto, rendered decision granting summary judgment in favor of

Defendants and against Plaintiff Leonard McSherry ("McSherry").

IT IS THEREFORE ORDERED AND ADJUDGED that judgment in this action is entered in favor of Defendants Turley and Roberson on the basis of qualified immunity and all other individual claims against Turley and Roberson are dismissed. The municipal liability claims against City and LBPD are dismissed as pendant to the individual liability claims. Plaintiff McSherry take nothing, that the action be dismissed with prejudice, on the merits, and Defendants may apply to recover their costs by Application to the Clerk of Court.

DATED: MAY 26, 2006

/s/ Gary Klausner
R. Gary Klausner, Judge
United States District Court

P-SEND, CLOSED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMENDED CIVIL MINUTES – GENERAL

Case No. CV 02-3767-RGK (MANx)

Date May 15, 2006

Title ***LEONARD McSHERRY v. CITY OF LONG BEACH, et al.***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) PLAINTIFF'S MOTION TO CONTINUE TRIAL DATE (DE 214); DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DE 216)

I. INTRODUCTION

Plaintiff Leonard McSherry ("McSherry"), brings this civil rights action under 42 U.S.C. § 1983 against multiple Defendants: the City of Long Beach ("City"), Long Beach Police Department ("LBPD"), Officer Norman Turley ("Turley"), and Sergeant Carthel S.

Roberson ("Roberson") (collectively "Defendants"). McSherry alleges that Defendants' improper investigative practices and policies violated his Fourth, Fifth, and Fourteenth Amendment rights which led to his conviction for child molestation.

The following facts are undisputed, unless otherwise stated:

On March 11, 1988, six year-old Candice Birr ("Candice") was abducted from a playground near her home in Long Beach, California and raped. Her abduction was witnessed by her four year-old brother, Matthew Birr ("Matthew") and Robin Davis ("Robin"), a neighbor who reportedly saw a suspicious looking man driving an unfamiliar green pick-up truck in the area on the day of the abduction. On May 17, 1988, McSherry was arrested at his grandparents' home for the kidnaping and rape of Candice.

Shortly after McSherry's arrest, Defendants Turley and Roberson interrogated McSherry, who provided a detailed description of the bedroom where the alleged rape occurred. Turley interviewed Candice the following day to obtain a description of the place to which she had been taken. Candice provided Turley with specific details of the interior, including the color of the sheets on the bed, and a description of a photograph hanging on the wall. The description conformed to the interior of the bedroom in McSherry's grandparents' house. Candice also identified McSherry's grandparents' house from an array of photographs.

Turley served a search warrant on McSherry's grandparents' house the following day. McSherry argues that in her next interview, Candice added more details to her description of the interior of the house, including the shape of the mirror, the location of a photograph, and the sound of a bird in the next room. During the course of the investigation, McSherry was positively identified as the perpetrator by Candice, Matthew, and Robin in separate photographic show-ups, live line-ups, and in-court identifications. Candice and Matthew also identified McSherry's father's small yellow Mazda station wagon as the vehicle used in the kidnaping.

In December 2001, McSherry had served nearly fourteen years of a 48-year to life prison sentence before his conviction was overturned based on subsequent DNA analysis. The DNA matched that of George Valdespino, who later confessed in December 2001 that in 1988 he had kidnaped a girl in Long Beach in a green Ford Ranchero and molested her in a motel room.

On May 8, 2002, McSherry filed a Complaint against City, LBPD, and Turley, and subsequently filed a First Amended Complaint ("FAC") on March 21, 2003 to add Roberson as a defendant, alleging the following claims pursuant to 42 U.S.C. § 1983: (1) Fourteenth Amendment due process claim against Turley and Roberson for unconstitutional interview procedures; (2) Fourth and Fourteenth Amendment claim against Turley and Roberson for false arrest; (3) unconstitutional identification techniques against

City and LBPD; (4) failure to train and supervise against City and LBPD; (5) negligent hiring and retention against City and LBPD; and (6) supervisory liability against Roberson and LBPD.

On October 21, 2003, just prior to the commencement of trial, Defendants filed a Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50 ("Rule 50") on the basis of qualified immunity. The Court heard oral argument on the first day of trial, and on November 13, 2003, the Court granted Defendants' Rule 50 Motion.

On November 18, 2003, McSherry filed an appeal to the United States Court of Appeals for the Ninth Circuit. In its appeal, McSherry argued that dismissal was improper under Rule 50. Defendants, however, maintained that their motion was proper under Rule 50(a)(2), permitting motions "at any time before submission of the case to the jury."

The Ninth Circuit rejected Defendants' interpretation, and held that the use of Rule 50 at the outset of trial, prior to the presentation of any evidence is not supported by the language of the rule, the advisory committee's notes to the 1991 Amendments, or caselaw. Specifically, the Ninth Circuit concluded that the advisory committee's notes made clear that a court may not grant a Rule 50 motion before a party has presented evidence in the case, emphasizing that Rule 50(a)(2) clearly sets forth the requirement that a party be "fully heard" on an issue prior to the grant of a Rule 50 motion. While "early action" is permissible

under Rule 50, the Ninth Circuit further stated that in the present case, it was "*too* early: McSherry was not afforded an opportunity to present evidence bearing on the issue of qualified immunity, nor was he 'apprised of the materiality of the dispositive fact.'" Accordingly, on January 18, 2006, the Ninth Circuit issued a Mandate vacating and remanding the November 13, 2003 Order.

On March 27, 2006, Defendants filed a Motion for Summary Judgment, which is presently before the Court. For the reasons stated below, the Court grants Defendants' Motion.

II. JUDICIAL STANDARD

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon such a showing, the Court may grant summary judgment as to "all or any part thereof." Fed. R. Civ. P. 56(a), (b).

To prevail on a summary judgment motion, the moving party must show there are no triable issues of fact as to matters upon which it has the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an

absence of evidence to support the nonmoving party's case. *Id.* at 326.

To defeat a summary judgment, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp v. Catrett*, 477 U.S. at 324.

III. DISCUSSION

A. Qualified Immunity Is Warranted

Generally, the actions of government officials are protected from civil liability under the doctrine of qualified immunity. *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When a public official asserts qualified immunity from liability in a Section 1983 action, the Court must determine whether, in light of clearly established principles governing the conduct in question, the official objectively could have believed that his conduct was lawful. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). The Court must determine whether officials acted reasonably under settled law in the circumstances, not whether another reasonable approach

can be invented after the fact. *Hemphill v. Kincheloe*, 987 F.2d 589, 591-92 (9th Cir. 1993).

The Supreme Court has instructed that qualified immunity shields officers from § 1983 actions where a reasonable officer could conclude, even if he is mistaken, that probable cause is present. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Moreover, the qualified immunity doctrine "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.* at 229. Because qualified immunity is "an entitlement not to stand trial" rather than a defense to liability, it is important to resolve immunity questions at the earliest possible stage of litigation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If a reasonable official could have believed that his actions were lawful, summary judgment on the basis of qualified immunity is appropriate. *Hemphill*, 987 F.2d at 593.

This Court finds that even though modern DNA analysis revealed that another suspect, George Valdespino, committed the crime against Candice, Defendants had probable cause to arrest and charge McSherry because McSherry was positively identified as the culprit by several eyewitnesses supported by corroborating evidence. Candice identified McSherry twice prior to his arrest in a photo showup and later in a live lineup. Matthew and neighbor Robin also positively identified McSherry in a photo showup and live lineup. In addition, Candice and Matthew selected from an array of photographs, McSherry's father's small yellow Mazda station wagon as the car used in

the kidnaping. It is undisputed that McSherry had been seen driving the vehicle. Corroborating evidence from the Los Angeles County Sheriff 's crime lab further concluded that McSherry was a possible donor of the semen taken from Candice's rape kit. Thus, based on the totality of the evidence, Defendants had probable cause to arrest and charge McSherry.

B. Deliberate Fabrication of Evidence Claim Lacks Support

McSherry argues that because it is uncontroverted that Candice was never inside McSherry's grandparents' house, Turley's testimony at trial relating to Candice's alleged description of the interior of the grandparents' house was deliberately fabricated. To prove this claim, McSherry "must, *at a minimum*, point to evidence that . . . Defendants continued their investigation . . . despite the fact that they knew or should have known that he was innocent" or that "Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). This claim fails because McSherry has not adduced or presented any evidence that Defendants deliberately fabricated evidence, or acted in a way that produced false information.

McSherry was charged for the crime based on an independent investigation of the evidence by District Attorney Ken Lamb. McSherry was later convicted on

the basis of the testimony and in-court identifications by Candice, Matthew, Robin, and Turley's testimony about Candice's identification and description of McSherry's grandparents' house. In light of the totality of the circumstances, there is no evidence that Defendants knew or should have known that McSherry was innocent.

Moreover, McSherry specifically argues that Turley employed unconstitutionally suggestive procedures to cause Candice and Matthew to identify McSherry and McSherry's father's yellow Mazda during the photographic show-ups. However, mere allegations and inferences that Defendants used interviewing techniques that were in some sense improper does not give rise to a due process claim under Section 1983. There is no constitutional due process right to have child witnesses in a sexual abuse case be interviewed in any "particular manner, or to have the investigation carried out in a particular way." *Devereaux*, 263 F.3d at 1075. Interviewers of child witnesses in sexual abuse investigation "must be given some latitude in determining when to credit witnesses' denials and when to discount them." *Id.* Thus, suggestive interviewing methods, even if it "violated state regulations, without more, cannot serve as the basis for a claim under § 1983. *Id.* McSherry has failed to make or support any factual allegations of any fabrication of evidence against Defendants that were logically capable of supporting such a claim.

C. Monell Liability for the City and the LBPD

McSherry brings § 1983 claims against City and LBPD under *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658 (1978), alleging that City and LBPD maintained policies or practices that included failure to train or supervise officers on investigation procedures, and reckless retention or assignment of officers. The *Monell* claim against City and LBPD fails because McSherry has not shown a constitutional violation at the hand of Turley or Roberson. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *see also Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (holding that a governmental officer or entity can be found liable in an official capacity "only if policy or custom or a one-time decision by a governmentally authorized decision-maker . . . played a part in the violation of federal law.")

D. McSherry's Motion to Continue Trial

In light of the Court's granting of Defendants' Motion for Summary Judgment, McSherry's Motion to Continue Trial is deemed as moot.

IV. CONCLUSION

For the foregoing reasons, Defendants Turley and Roberson's Motion for Summary Judgment on the basis of qualified immunity is hereby **granted** and all other individual claims against Turley and Roberson are **dismissed**. The municipal liability claims against

City and LBPD are **dismissed** as pendant to the individual liability claims.

IT IS SO ORDERED.

Initials of Preparer _____: slw

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD MCSHERRY, Plaintiff-Appellant, v. CITY OF LONG BEACH; LONG BEACH POLICE DEPARTMENT; NORMAN TURLEY; CARTHEL S. ROBERSON, in his individual and official capacities, Defendants-Appellees.	No. 06-55837 D.C. No. CV-02-03767-RGK Central District of California, Los Angeles ORDER (Filed Jan. 20, 2010)

Before: TROTT, CLIFTON and CALLAHAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Clifton and Callahan have voted to deny the petition for rehearing en banc and Judge Trott so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

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No. 09-1284

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In The
Supreme Court of the United States

LEONARD MCSHERRY,

Petitioner,

v.

CITY OF LONG BEACH, LONG BEACH POLICE DEPARTMENT, NORMAN TURLEY, and CARTHEL S. ROBERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner was arrested and charged with kidnapping and raping a six-year old girl based on probable cause -- (a) he was repeatedly identified as the perpetrator by the victim, the victim's brother, and an adult neighbor, (b) he was a registered sex offender with a history of convictions and imprisonment for kidnapping and molesting young girls, and (c) a crime laboratory concluded that he was a possible donor of the involved semen. As the Court of Appeals below held, the determination of probable cause was not tainted by fabricated evidence or police misconduct, the prosecutor conducted an exhaustive independent investigation, and, under those circumstances, Petitioner has no claim against Respondents, a municipality, its police department, and two police officers. The Court of Appeals' decision below is consistent with, and is not contrary to, other Courts of Appeals' decisions. Should this Court grant certiorari to resolve a non-existent conflict of decisions of the Courts of Appeals?

2. Police officers are absolutely immune from liability for their trial testimony. There may be an exception to this absolute immunity where a plaintiff makes a malicious-prosecution-type claim and a police officer is the complaining witness. The Court of Appeals below held that the victim, not a Respondent police officer, was the complaining witness. In addition, any complaining-witness exception is irrelevant

QUESTIONS PRESENTED – Continued

where, as here, there is probable cause because probable cause independently bars any malicious-prosecution-type claim. The Court of Appeals' decision below is consistent with, and is not contrary to, other Courts of Appeals' decisions. Should this Court grant certiorari to resolve a non-existent conflict of decisions of the Courts of Appeals?

3. This Court in *Hartman v. Moore* held that a plaintiff must plead and prove the lack of probable cause in a retaliatory-prosecution case, where, in alleged retaliation for plaintiff's exercise of First Amendment rights, a person convinces a prosecutor to file charges against plaintiff. Since *Hartman*, the Courts of Appeals have held that *Hartman*'s probable-cause requirement applies to other kinds of cases, including claims based on alleged violations of other constitutional rights where a prosecutor has filed charges. The Court of Appeals' decision below is consistent with, and is not contrary to, other Courts of Appeals' decisions. Should this Court grant certiorari to resolve a non-existent conflict of decisions of the Courts of Appeals?

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STATEMENT OF THE CASE

Statement of Facts

This case involves the 1988 kidnapping and rape of Candice, a six-year-old girl, from a Naval base playground in Long Beach, California.

In 1988 Petitioner Leonard McSherry was a registered sex offender with a history of convictions for kidnapping and molesting young girls. In 1970 McSherry forcibly abducted and sexually molested a six-year-old girl and later pleaded guilty to felony child molestation. In 1975 McSherry was convicted of lewd and lascivious conduct towards an eight-year-old girl and served four years in state prison. In 1979 McSherry was convicted of kidnapping a fifteen-year-old girl and served six years before being paroled. In 1986 McSherry was convicted of a misdemeanor involving children and sentenced to county jail. McSherry's official record shows that he first registered as a sex offender in California with respect to children in 1971 and renewed that registration in 1985.

Although Candice's initial identification did not closely match McSherry, Candice later identified McSherry as the perpetrator five times (with persons other than police officers, including nurses and Naval investigators, always present) – two photo line-ups, a live line-up, the preliminary hearing, and the trial. She identified McSherry as the perpetrator because she in fact believed that McSherry had kidnapped and raped her. Candice's brother, who witnessed the

kidnapping, also identified McSherry. An adult neighbor also identified McSherry four times – a photo line-up, a live line-up, the preliminary hearing, and the trial. The Sheriff's crime laboratory concluded McSherry was a possible donor of the involved semen. On May 17, 1988 McSherry was arrested.

Prosecutor Ken Lamb reviewed all of the evidence, including the witnesses' identifications, the witnesses' statements, the officers' statements, the physical evidence, the crime laboratory results, and other corroborating evidence, to ensure there was a case against McSherry, to ensure the reports and line-ups were lawful and not suggestive, and to verify the police information.

The prosecutor personally interviewed Candice several times and was convinced that her descriptions and identifications were based on what she remembered, not on any coaching or outside influence. Based on his extensive experience with child victims of sexual assault, he believed that her emotional state indicated that it would have been virtually impossible for anyone to coach her on what to say. The prosecutor also personally interviewed Candice's brother and all the adult witnesses, including the adult neighbor who had identified McSherry, and again concluded that their descriptions and identifications were based on their actual memories and not on coaching or outside influence.

On May 18, 1988 (the day after McSherry's arrest), the prosecutor authorized that McSherry be

charged on multiple counts. McSherry was later held to answer at the preliminary hearing. At the preliminary hearing, the only witnesses were Candice and the adult neighbor, both of whom identified McSherry as the perpetrator, as well as Candice's mother. In addition, the parties stipulated as to what Candice's examining physician would have said if he had personally testified. No police officers (including Police Officer Norman Turley) testified at the preliminary hearing.

After McSherry was arrested, in the presence of the Naval investigator and Officer Turley, Candice picked McSherry's grandparents' home out of a photo line-up, identifying it as the place McSherry had taken her and provided specific details about the room where she had been raped. Thereafter, the police served a search warrant at McSherry's grandparents' house. The victim's description generally matched a bedroom in the residence.

At McSherry's trial, the Naval investigator who had accompanied Officer Turley during his investigation said that the police did not influence Candice during the photo identifications. The Naval investigator, who was also present at the adult neighbor's photo line-up, also testified at trial that the neighbor was not coached. During the cross-examination of Officer Turley and the Naval investigator, the defense never claimed that Officer Turley manipulated the witnesses or employed unconstitutionally unreliable, improper, or suggestive identification techniques to cause the witnesses to falsely identify McSherry, the

vehicle, or the grandparents' home. McSherry was convicted of Candice's kidnapping and rape. His conviction was affirmed on appeal. *People v. McSherry*, 1992 Cal.App.LEXIS 1460 (December 17, 1992). In December 2001, based on improved DNA testing, McSherry was released from prison.

Statement of Proceedings

McSherry sued Respondents the City of Long Beach, California, the Long Beach Police Department, Police Officer Norman Turley, and Police Sergeant Carthel S. Roberson under 42 U.S.C. § 1983. In October 2003, on the first day scheduled for trial, the district court granted Respondents' Motion for Judgment as a Matter of Law under Fed.R.Civ.P. 50 on the ground of qualified immunity. The Court of Appeals for the Ninth Circuit reversed on procedural grounds. *McSherry v. City of Long Beach*, 423 F.3d 1015 (9th Cir. 2005).

On remand, the district court granted Respondents' motion for summary judgment on the ground of qualified immunity because, as a matter of law, probable cause existed for McSherry's arrest, McSherry's claim of fabricated evidence was not supported by proof, and the prosecutor had conducted an exhaustive independent investigation of the charges against McSherry. Petitioner's Appendix ("P.App.") 60-72.

McSherry appealed the adverse judgment. The Court of Appeals for the Ninth Circuit issued an initial decision that affirmed in part and reversed in

part the judgment. *McSherry v. City of Long Beach*, 560 F.3d 1125 (9th Cir. 2009). P.App. 45-59. In response to Respondents' Petition for Rehearing, the Court of Appeals withdrew its previous decision and issued a new decision that affirmed the judgment below in full. *McSherry v. City of Long Beach*, 584 F.3d 1129 (9th Cir. 2009). P.App. 1-44. The Court of Appeals held that (1) there was probable cause to arrest and charge McSherry (560 F.3d at 1135-36; P.App. 11-15); (2)(a) because the prosecutor filed charges, McSherry cannot sue non-prosecutorial officials, like Officer Turley, where probable cause existed to arrest and charge McSherry, (b) the prosecutor's independent judgment to charge and prosecute McSherry broke the chain of causation between the police officers' alleged unconstitutional actions and McSherry's alleged harm, and (c) the prosecutor's independent judgment was not tainted by the police officers' alleged unconstitutional actions (560 F.3d at 1136-47; P.App. 15-43); and (3) because McSherry's case against the police officers failed, he had no *Monell* claims against the City of Long Beach (560 F.3d at 1147; P.App. 43-44).

McSherry filed a petition for panel rehearing and rehearing en banc. The panel voted to deny the petition for panel rehearing. The full court was advised of the suggestion for rehearing en banc and no judge of the court requested a vote on it. P.App. 73.

REASONS FOR DENYING THE WRIT

I. There is no circuit conflict with the Court of Appeals' decision below, which held there was probable cause to arrest and prosecute McSherry and the prosecutor's decision to prosecute him was based on the prosecutor's independent investigation, untainted by any alleged police misconduct.

McSherry argues that Officer Turley supposedly fabricated evidence and presented it to the prosecutor, who then filed charges against McSherry based on that fabricated evidence. Nonetheless, McSherry continues, both the District Court and the Court of Appeals held the prosecutor's decision to file charges broke the causal chain between Officer Turley's purported wrongdoing and McSherry's alleged damages. Thus, McSherry concludes, this Court should grant certiorari to resolve the claimed conflicts between this case and other decisions of the Courts of Appeals.

McSherry's arguments have no merit. Both the District Court and the Court of Appeals found that, as a matter of law, there was probable cause to arrest and charge McSherry. Moreover, the decision to arrest and charge McSherry was not based on fabricated evidence. And the prosecutor's decision to file charges was based on an exhaustive independent investigation that broke the causal chain between any police action and any damage that McSherry claims to have incurred. Consequently, this case is not contrary to other Courts of Appeals' decisions and this Court has

no need to grant certiorari to resolve a non-existent conflict of decisions in the Courts of Appeals. Sup.Ct.R. 10(a).

A. There was probable cause to arrest and prosecute McSherry.

Probable cause to arrest exists where at the moment the arrest is made the totality of trustworthy circumstances sufficiently warrants an officer of reasonable caution and prudence in believing the arrestee has committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Here, probable cause existed to arrest and file charges against McSherry.

First, probable cause was supported by witness identifications. Before his arrest Candice had identified McSherry twice in two photo line-ups and identified the car used to kidnap her once. Candice's brother also identified McSherry and the same car. Thereafter, Candice identified McSherry at a live line-up, at the preliminary hearing, and at trial. An adult neighbor identified McSherry at a photo line-up, at a live line-up, at the preliminary hearing, and at trial.

Second, probable cause was supported by McSherry's extensive history of criminal sexual offenses, including abducting and sexually molesting young girls, for which he had been imprisoned on several occasions and which required his registration as a sex offender.

Third, probable cause was supported by the Sheriff's crime laboratory report, which concluded McSherry was a possible donor of the semen taken from Candice's rape kit.

Finally, McSherry was held to answer at the preliminary hearing, at which no police officers (including Officer Turley) testified. Both Candice and the adult neighbor identified McSherry at the preliminary hearing. A judge's decision to hold a defendant to answer after a preliminary hearing constitutes prima facie (although not conclusive) evidence of probable cause. This prima facie evidence may be overcome by a showing that the judge's decision at the preliminary hearing resulted from fabricated evidence. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004). There was no showing of such tainted evidence at McSherry's preliminary hearing.

B. The determination of probable cause to arrest and prosecute was not based on fabricated evidence or otherwise tainted by alleged police misconduct.

McSherry argues that Officer Turley fabricated evidence and presented it to the prosecutor, who then filed charges against McSherry based on that fabricated evidence. As a matter of undisputed fact, however, probable cause to arrest and prosecute McSherry was ***not*** based on fabricated evidence. There are two types of evidence on which McSherry bases his arguments about fabricated evidence.

First, McSherry argues that, because there were claimed discrepancies between Candice's initial descriptions of the perpetrator and her later photographic identifications of McSherry, Officer Turley must have engaged in improper and suggestive identification procedures.

To begin with, as a matter of law, there is no constitutional right to have child witnesses in a child sexual-abuse investigation interviewed in a particular manner or to have the investigation carried out in a particular way (*Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc)) and police officers need not limit their investigation to the witnesses' initial descriptions and then disregard their later photographic identifications even if there are significant differences between the two (*Hutsell v. Sayre*, 5 F.3d 996, 998, 1004 (6th Cir. 1993)).

In addition, as the Court of Appeals below held, the undisputed facts do not support McSherry's argument. P.App. 13-14. Nurses witnessed Candice's two photographic identifications of McSherry. Nothing in the record from the nurses even suggests coercive or improper identifications. The Naval investigator was also present at Candice's photographic identifications and testified at trial that Officer Turley did not make any effort to influence Candice. Moreover, Candice herself has never claimed that any of her identifications of McSherry were coerced or improperly suggested. Instead, she has continued to maintain that she identified McSherry at the photo line-ups (as well as at the live line-up, at the

preliminary hearing, and at trial) because she in fact believed McSherry was the perpetrator. She has also continued to maintain that her identifications of McSherry were honest and truthful at the time they were made.

As for the identification of McSherry by Candice's brother, there is also no evidence of improper police conduct. The Naval investigator was also present during the brother's photo identification of McSherry.

And as for the adult neighbor's identification of McSherry at a photo line-up, at a live line-up, at the preliminary hearing, and at trial (all of which took place after McSherry was arrested and charged), McSherry argues that it was based on a newspaper picture of McSherry. But there is no evidence that the neighbor even saw the picture much less based her identification of McSherry on any newspaper picture.

Second, McSherry argues that, because there were discrepancies between Candice's initial descriptions of the location of the incident and her later description of the location, which she gave to Officer Turley after McSherry's arrest, Officer Turley fabricated the later description of the location and committed perjury about the description of the incident's location at trial.

As the Court of Appeals below held, however, the alleged fabricated description of the location (involving McSherry's grandparents' house) was ***not*** material to probable cause to arrest and charge McSherry because it was not obtained until ***after*** McSherry was

arrested and charged. P.App. 14. This is because the search warrant of McSherry's grandparents' house was not obtained, and the search based on that warrant did not occur until ***after*** the prosecutor authorized McSherry to be charged and ***after*** McSherry's arrest.

Moreover, neither Officer Turley nor any other police officer testified at McSherry's preliminary hearing (about the location of the incident or anything else). Both Candice and the adult neighbor identified McSherry at the preliminary hearing. Candice described where she was taken in vague terms, although she consistently described the location as a "house," not a "motel." (At McSherry's trial, she testified that Officer Turley had shown her pictures of "houses" and that she picked out the "house" where she had been taken.)

C. The prosecutor's independent judgment to file charges broke the causal chain between the alleged unconstitutional acts and any subsequent alleged injury.

McSherry argues that the prosecutor did not exercise independent judgment in filing charges against McSherry and, consequently, the prosecutor's filing charges did not limit Officer Turley's potential liability. McSherry's argument lacks merit.

As the Court of Appeals comprehensively explained, the prosecutor conducted an extensive and

thorough investigation entirely independent of the police investigation. P.App. 16-42. He reviewed all of the evidence, including the witnesses' identifications, the witnesses' statements, the officers' statements, the physical evidence, the criminal laboratory results, and other corroborating evidence, to ensure there was a case against McSherry, to ensure the reports and line-ups were lawful and not suggestive, and to verify the police information. He personally interviewed Candice several times and was convinced that her descriptions and identifications were based on what she remembered, not on any coaching or outside influence.[1] He did the same for Candice's brother and all the adult witnesses and reached the same conclusion.

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[1] McSherry's primary argument about the prosecutor's supposed lack of an independent investigation is purportedly based on an answer in his "declaration" (actually his deposition) in which, in response to a question about whether he talked to Candice about her original description of the location, he supposedly said, "No . . . " Petition 15, n. 2. As the ellipsis indicates, however, McSherry did not disclose the full answer, which is decidedly different:

> "A No. What I would ask her is what can you tell me about the place. Now if that's asking her about her original description, that would be, I guess, a yes, but I wouldn't tell her details, if that's what you're asking. I'm not sure." P.App. 39.

The prosecutor then described in detail what he did to resolve in his own mind the differences in the descriptions of the location, including asking Candice herself about the differences. P.App. 39-41.

D. The Court of Appeals' decision below is not contrary to other decisions of the Courts of Appeals.

McSherry argues that the Court of Appeals' decision below is contrary to other decisions of the Courts of Appeals. Under the facts of this case as they actually exist (rather than as McSherry erroneously claims they exist) – McSherry was arrested and charged based on probable cause untainted by police misconduct and the prosecutor conducted an exhaustive, independent investigation – the Court of Appeals' decision below is not contrary to other decisions of this Court or the Courts of Appeals.

Unlike this case, most of McSherry's cited cases involved arrests or prosecutions that lacked probable cause:

- *Malley v. Briggs*, 475 U.S. 335, 344-46 (1986) (A police officer was not entitled to qualified immunity where his application to a magistrate to issue an arrest warrant lacked probable cause.).
- *Kerman v. City of New York*, 374 F.3d 93, 106, 120, 126-28 (2nd Cir. 2004) (Where a police officer had no probable cause to commit plaintiff to a mental hospital, the hospital's decision to keep him there did not break the causal chain of liability when the hospital's decision was based on the police officer's recommendation.).

- *Zahrey v. Coffey*, 221 F.3d 342, 345-46, 349-355 (2nd Cir. 2000) (When a prosecutor, while investigating plaintiff, allegedly presented fabricated evidence that he had created to the grand jury, the grand jury's determination of probable cause did not break the causal chain of liability since the grand jury's determination was based on the prosecutor's alleged fabricated evidence.).

- *Buenrostro v. Collazo*, 973 F.2d 39, 41 (1st Cir. 1992) (Plaintiff was unlawfully arrested without an arrest warrant, a search warrant, or exigent circumstances and the magistrate's probable cause determination was based on the alleged false accusations by police officers.).

- *Burke v. McDonald*, 572 F.3d 51, 58-62, 60, n. 9 (1st Cir. 2009) (A magistrate's decision to arraign plaintiff was not a superseding cause cutting off liability because the police had withheld exculpatory information, which negated probable cause, from the prosecutor and the magistrate at the arraignment hearing.).

- *Jones v. City of Chicago*, 856 F.2d 985, 988-91, 993-95 (7th Cir. 1988) (The prosecutor's decision to prosecute was not a superseding cause where the police officers' arrest report was filled with falsehoods, the police withheld exculpatory evidence, the police officers failed

to advise the prosecutor of the false evidence and withheld evidence, and there was no probable cause to prosecute.).

- *Anthony v. Baker*, 767 F.2d 657, 664-67 (10th Cir. 1985) (The grand jury indictment and the preliminary hearing determination of probable cause were tainted by fabricated and withheld evidence.).

- *Smiddy v. Varney*, 665 F.2d 261, 265, 266-67 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986) (Where there is no probable cause to arrest, the police officers' liability is cut off by the superseding cause of the prosecutor's filing charges where the prosecutor exercises independent judgment and where, in connection with the prosecutor's decision to file charges, the police officers have not unduly pressured the prosecutor or presented knowingly false evidence to the prosecutor.).

- *Wagenmann v. Adams*, 829 F.2d 196, 205-09, 211-13 (1st Cir. 1987) (A bail commissioner's decision was not a superseding cause of plaintiff's injuries where plaintiff's arrest and detention lacked probable cause and where the bail commissioner relied entirely on the police officers' representations and did not exercise independent judgment.).

- *Barlow v. Ground*, 943 F.2d 1132, 1135, 1136-1137 (9th Cir. 1991), *cert. denied*,

505 U.S. 1206 (1992) (The prosecutor's decision to file charges was not the proximate cause of plaintiff's damages where there was a genuine issue as to whether the police officers had probable cause to arrest plaintiff and the prosecutor did not exercise independent judgment in deciding to file charges but instead relied only on the police officers' reports, which omitted crucial information.).

- *Borunda v. Richmond*, 885 F.2d 1384, 1390, 1391 (9th Cir. 1988) (The prosecutor's decision to file charges was not the proximate cause of plaintiff's damages where there was no probable cause to arrest plaintiff, the prosecutor relied only on the police officers' reports, and the police officers made misrepresentations to the prosecutor.).

- *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1072-74 (2nd Cir. 1997) (Relying on cases holding that the causal chain is not broken by a judge's issuance of an arrest warrant where the application for the arrest warrant lacked probable cause, the court held that the causal chain was not broken by a judge's order adopting a probation department's recommendation of an unconstitutional religious therapy program where the court routinely adopted the probation department's recommendations without

making an independent investigation or decision.).

One of McSherry's cited cases involved an arrest and prosecution where probable cause was present. *Hand v. Gary*, 838 F.2d 1420, 1426-28 (5th Cir. 1988) (The causal chain was broken by a criminal indictment where there was probable cause to arrest and prosecute and the decision to do so was not tainted by withheld information.).

Three of McSherry's cited cases involved the erroneous admission of unconstitutionally obtained evidence or other errors at a trial or other judicial hearing. In *Egervary v. Young*, 366 F.3d 238, 246-51 (3rd Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005), federal officials, who had successfully sought an improper ex parte order, without notice, against a father in connection with an international child custody dispute were held to be not liable because the judge's erroneous decision to enter the order was a superseding cause to the officials' acts. Similarly, in *Duncan v. Nelson*, 466 F.2d 939, 943-45 (7th Cir. 1972), the trial court's improper decision to admit an unlawful confession obtained by police officers into evidence was a superseding cause of all damages based on plaintiff's conviction and incarceration because it was the trial court's responsibility to determine applicable law and procedures. In *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006), however, the prosecutor's use of an improper statement obtained by police officers into evidence was not a superseding

cause and did not preclude a claim against the police officer. But *McKinley* did not consider the issue decided in *Egervary* and *Duncan* – that the trial judge's improper decision to conduct a hearing violating due process or to admit the improperly obtained statement was a superseding cause, cutting off the police officer's liability.[2]

Two of McSherry's cases involved circumstances that do not neatly fall within the categories mentioned above. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557-58, 560-61 (1st Cir. 1989) (Where four police officers participated in unwarranted shooting toward plaintiff but only one bullet hit him, the other officers were not rendered immune from liability on the ground that the acts of the officer whose bullet actually injured plaintiff was a superseding cause of the injury since the other officers also participated in the unlawful acts leading to plaintiff's injury, which was the result of a team effort.); *Lanier v. Sallas*, 777 F.2d 321, 322-25 (5th Cir. 1985) (Where plaintiff was committed to a mental hospital based on false certifica ions by court-appointed doctors, who had never actually seen plaintiff, the proximate cause of the commitment was the judge's reliance on the false statements in the certifications, not the fact that the

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[2] To the extent that there is circuit conflict on this issue, this case is not the appropriate vehicle to resolve that conflict because the Court of Appeals below did not consider what effect a trial court's improper decision may have as a superseding cause, cutting off the police officers' liability.

judge relied on certifications filed after the statutorily mandated time.).

Finally, one of McSherry's cited cases held that it did not have to decide the police officers' argument that the prosecutor's and grand jury's decisions to prosecute and indict plaintiff were superseding causes of plaintiff's damages arising out of an unlawful search and seizure because plaintiff was not entitled to any damages after his arraignment. *Hector v. Watt*, 235 F.3d 154, 155-61 (3rd Cir. 2001).

Many of these cases are irrelevant to any issue here. None of them is contrary to the decision of the Court of Appeals below – McSherry has no claim where there was probable cause to arrest and prosecute him and the prosecutor's decision to prosecute him was based on the prosecutor's independent investigation, untainted by any alleged police misconduct.

Moreover, the decision of the Court of Appeals below is consistent with this Court's most recent decision on the causation issue. *Hartman v. Moore*, 547 U.S. 250 (2006). In *Hartman*, this Court held that a plaintiff has no claim against a person for inducing a prosecutor to file criminal charges against plaintiff in retaliation for plaintiff's exercising First Amendment rights unless plaintiff has alleged and proved that the criminal charges lacked probable cause. *Id.* at 259-65. If probable cause exists, it is irrelevant how much retaliatory animus the person who induced the prosecution may have had or whether the

prosecutor filed the charges as a rubber stamp for the police or others or had other improper motives for filing the charges. *Id.* at 264.

The decision of the Court of Appeals below is also consistent with other decisions of the Courts of Appeals after *Hartman*. In *Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir. 2008) – a decision that the Court of Appeals below relied upon (P.App. 15-16) but which McSherry does not even mention – the Court held that in ***any*** constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution, a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution ***must*** show the absence of probable cause. *Id.* at 865.

Other decisions of the Courts of Appeals have applied *Hartman* to require proof of probable cause in order to proceed in constitutional tort claims. *McBeth v. Himes*, 598 F.3d 708, 712-20 (10th Cir. 2010) (Plaintiff had no claim against a police officer for acting with retaliatory animus, even where there was no claim of retaliatory prosecution, because there was no proximate causation between the police officer's acts and plaintiff's alleged damages where plaintiff did not claim lack of probable cause.); *Williams v. City of Carl Junction*, 480 F.3d 871, 875-77 (8th Cir. 2007) (Plaintiff had no claim for the filing of criminal citations in alleged retaliation for exercising First Amendment rights where intervening acts by the prosecutor were not present because there was probable cause for filing the citations.); *Barnes v. Wright*,

449 F.3d 709, 715-20 (6th Cir. 2006) (The presence of probable cause barred malicious-prosecution and false-arrest claims even where intervening acts by a prosecutor were not present.).[3]

The decision of the Court of Appeals below is also consistent with other decisions of the Courts of Appeals before *Hartman* holding that the presence of probable cause bars claims like McSherry's. *See, e.g.*, *Kerr v. Lyford*, 171 F.3d 330, 340-41 (5th Cir. 1999) (Claims against non-prosecutor defendants were barred because the prosecutor's intervening actions severed their responsibility for plaintiffs' allegedly unreasonable seizure, false arrest, and false imprisonment and because, as a matter of law, probable cause to prosecute remained when the allegedly tainted evidence was not considered.); *Taylor v. Gregg*, 36 F.3d 453, 456-57 (5th Cir. 1994) (Causation in plaintiff's claim against police officers for false arrest was broken by plaintiff's appearance before a

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[3] The Ninth Circuit, taking the admittedly minority view, has held that proving the lack of probable cause is not required in an "ordinary" retaliation claim, as opposed to a retaliatory prosecution claim, particularly where there was barely enough evidence of probable cause and strong evidence of retaliatory motive. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-35 (9th Cir. 2006). The Ninth Circuit, however, subsequently recognized that, while the presence of probable cause is not "dispositive," it undoubtedly has "high probative force." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900-01 (9th Cir. 2008), quoting *Hartman*, 547 U.S. at 265. This case, however, is not the appropriate vehicle to resolve any conflicts of decisions in "ordinary" retaliation cases since this case is not such a case.

magistrate and the grand jury indictment where no evidence showed that the allegedly false information was relied upon by either the magistrate or the grand jury.).

Because there is no circuit conflict with the Court of Appeals' decision below, the Petition should be denied.

II. There is no circuit conflict with the Court of Appeals' decision below, which held that police officers' trial testimony is absolutely privileged where the victim, not the police officers, was the complaining witness.

McSherry argues that, while police officers are ordinarily entitled to absolute immunity for trial testimony, even if perjurious, there is an exception for complaining witnesses and the Court of Appeals below erred in finding that Officer Turley was not the complaining witness.

McSherry's argument has no merit. As the Court of Appeals below properly held, Candice, not Officer Turley, was the complaining witness. In addition, the complaining-witness exception arises only in the malicious-prosecution aspect of a Section 1983 claim. The complaining-witness exception becomes irrelevant where, as here, there was probable cause to arrest and prosecute because the presence of probable cause independently bars any malicious-prosecution-type claim under Section 1983. McSherry has not

shown that the Court of Appeals' decision below is contrary to other Courts of Appeals' decisions. This Court has no need to grant certiorari to resolve a non-existent conflict of decisions in the Courts of Appeals. Sup.Ct.R. 10(a).

Police officers, like all witnesses, are absolutely immune from liability under Section 1983 for alleged perjured or fabricated trial testimony. *Briscoe v. LaHue*, 460 U.S. 325 (1983). "Subjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." *Id.* at 343.

McSherry argues that Officer Turley's trial testimony is not absolutely privileged because Officer Turley was the complaining witness. As the Court of Appeals below held, however, Officer Turley was not the complaining witness. P.App. 42-43. Instead, it was the victim, Candice, who identified McSherry as the perpetrator five times – two photo line-ups, a live line-up, the preliminary hearing, and the trial. Officer Turley did not even testify at the preliminary hearing, where McSherry was held to answer for trial.[4]

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[4] There is a question of whether there is in fact a complaining-witness exception to the absolute immunity usually granted to trial witnesses. The 11th Circuit and the 3rd Circuit have rejected creating a complaining-witness exception to absolute

(Continued on following page)

In McSherry's cited cases, unlike this case, there was no complaining victim. Instead, the alleged crimes took place in the police officers' presence or were directed against them. *Harris v. Roderick*, 126 F.3d 1189, 1192-94, 1198-99 (9th Cir. 1997) (alleged perjury about plaintiff's conduct connected with police officers' attempted arrest of another person); *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992) (alleged perjury about plaintiff's conduct connected with a police gambling raid); *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988) (alleged perjury about police officers' observing plaintiff selling drugs). Or a crime was determined to have been committed as a result of a police investigation, not a complaining victim. *Anthony v. Baker*, 955 F.2d 1395, 1396-1402 (10th Cir. 1992) (alleged perjury concerning extensive arson investigation that defendant headed; remand to resolve the complaining-witness issue). Or the police officer swore to the charging document's stated facts under penalty of perjury. *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997). Or some combination of these situations. *Malley v. Briggs*, 475 U.S. 335, 339-45 (1986) (police officer's complaint and affidavit based

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immunity while the 9th Circuit and the 2nd Circuit have recognized such an exception. *See Rehberg v. Paulk*, 598 F.3d 1268, 1277-79 (11th Cir. 2010). This case, however, is not the appropriate vehicle to resolve any conflict that exists here since Officer Turley was not the complaining witness and since the concept of a complaining witness is irrelevant where, as here, there was probable cause to arrest and prosecute McSherry.

on personal knowledge from wiretap).[5] None of those circumstances exists here.

McSherry has cited no decision supporting his expansive definition of "complaining witness." His definition is so broad that it would apply to virtually every police officer conducting a criminal investigation and nullify the absolute immunity of police officers testifying at trial recognized by *Briscoe*.

Moreover, the "complaining witness" issue is irrelevant here because probable cause existed to arrest and prosecute McSherry. The "complaining witness" issue arises only in the malicious-prosecution aspect of a Section 1983 claim. In this context, all witnesses are absolutely immune from liability except for the complaining witness, who remains potentially liable for malicious prosecution. *Malley*, 475 U.S. at 340-41; *Harris*, 126 F.3d at 1198-99. But if the prosecution was based on probable cause, the malicious-prosecution-type claim independently fails because the lack of probable cause is a necessary element to such a claim. *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). This means that, if the prosecution was based on probable cause, plaintiff has no malicious-prosecution claim under Section

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[5] McSherry also cities *Kulas v. Flores*, 255 F.3d 780 (9th Cir. 2001), *cert. denied*, 535 U.S. 995 (2002). But there the police officer was held not to be a complaining witness, there was no evidence to the contrary, and the police officer was thus entitled to absolute immunity. *Id.* at 783, 784.

1983 against a complaining witness. *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 & n. 6 (9th Cir. 2009). Here, probable cause to arrest and prosecute McSherry existed. Officer Turley's trial testimony is thus absolutely privileged, regardless of whether he was the complaining witness.

Because there is no circuit conflict with the Court of Appeals' decision below, the Petition should be denied.

III. There is no circuit conflict with the Court of Appeals' decision below, which held that *Hartman v. Moore*, requiring a plaintiff to prove lack of probable cause in a retaliatory-prosecution case, applies to other constitutional torts.

McSherry argues that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), requiring a plaintiff to prove lack of probable cause in a retaliatory-prosecution case, should not be applied to other constitutional torts and that the Court of Appeals' decision below, which applied *Hartman* in a non-retaliatory-prosecution case, conflicts with other decisions of the Courts of Appeals.

McSherry's argument has no merit. McSherry has not shown that the Court of Appeals' decision below is contrary to other Courts of Appeals' decisions. This Court has no need to grant certiorari to resolve a non-existent conflict of decisions in the Courts of Appeals. Sup.Ct.R. 10.

With one exception, every case that McSherry cites that supposedly creates a conflict with the Court of Appeals' decision below predates this Court's 2006 decision in *Hartman*. The Sixth Circuit in *Greene v. Barber*, 310 F.3d 889, 895, 896-97 (6th Cir. 2002), did hold that the existence of probable cause is not determinative if a plaintiff is arrested in retaliation for having engaged in constitutionally protected speech. The Sixth Circuit, however, subsequently recognized that, since *Hartman*, *Greene* no longer states good law. *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007) ("*Hartman*, therefore, calls into question our cases holding that 'probable cause is not determinative of the [First Amendment] constitutional question.' *See Greene*, 310 F.3d at 895.") (brackets in original); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) ("[I]t is clear that the *Hartman* rule modifies our holdings in *McCurdy* and *Greene* and applies in this case. As discussed above with regard to Barnes's malicious-prosecution claim, the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case. Barnes's First Amendment retaliation claim accordingly fails as a matter of law.") (brackets in original).

McSherry's other pre-*Hartman* cases do not in fact hold that the existence of probable cause is determinative ***only*** if a plaintiff was arrested in retaliation for having engaged in constitutionally protected speech. *DeLoach v. Bevers*, 922 F.2d 618, 620-21 (10th Cir. 1990) (Plaintiff's claim of retaliatory prosecution against a police officer was not

shielded because of the intervening acts of the district attorney's decision to prosecute, the magistrate's decision to issue an arrest warrant, and the judge's decision at the preliminary hearing where the officer mischaracterized the evidence and concealed the exculpatory evidence.); *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) (Probable cause to arrest plaintiff defeated her retaliatory-arrest claim.); *Keenan v. Tejeda*, 290 F.3d 252, 260-61 (5th Cir. 2002) (Plaintiff's claim for retaliatory arrest and prosecution were not barred as a matter of law where there were disputed facts as to whether the arrest and prosecution lacked probable cause.); *Curley v. Village of Suffern*, 268 F.3d 65, 72-73 (2nd Cir. 2001) (Probable cause to arrest plaintiff defeated his retaliatory-arrest claim.); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (Probable cause to arrest plaintiff defeated his retaliatory-arrest claim.).

The only post-*Hartman* case that McSherry cites is *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-35 (9th Cir. 2006). There, the Ninth Circuit held that proving the lack of probable cause is not required in an "ordinary" retaliation claim, as opposed to a retaliatory-prosecution claim, particularly where there was barely enough evidence of probable cause and strong evidence of retaliatory motive. The Ninth Circuit, however, subsequently acknowledged that *Skoog* represents a minority view and that, while the presence of probable cause is not "dispositive," it

undoubtedly has "high probative force." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900-01 (9th Cir. 2008), quoting *Hartman*, 547 U.S. at 265.

Other Court of Appeals' decisions have applied *Hartman* in cases other than retaliatory-prosecution cases. *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (In ***any*** constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution ***must*** show the absence of probable cause); *McBeth v. Himes*, 598 F.3d 708, 712-20 (10th Cir. 2010) (Plaintiff had no claim against a police officer for acting with retaliatory animus, even where there was no claim of retaliatory prosecution, because there was no proximate causation between the police officer's acts and plaintiff's alleged damages where plaintiff did not claim lack of probable cause.); *Williams v. City of Carl Junction*, 480 F.3d 871, 875-77 (8th Cir. 2007) (Plaintiff had no claim for the filing of criminal citations in alleged retaliation for exercising First Amendment rights where intervening acts by the prosecutor were not present because there was probable cause for filing the citations.); *Barnes v. Wright*, 449 F.3d 709, 715-20 (6th Cir. 2006) (The presence of probable cause barred malicious-prosecution and false-arrest claims even where intervening acts by a prosecutor were not present.).

McSherry does not cite any Court of Appeals' decision holding that, while lack of probable cause ***must*** be proved in First Amendment cases that involve a prosecutor, lack of probable cause is ***not*** required in other constitutional tort cases that involve a prosecutor. Nor does McSherry even attempt to articulate why there should be a distinction between these two kinds of cases.

Beck held that, in the context of a Fourth Amendment case, there is in fact no distinction between these kinds of cases:

> "We see no reason to limit *Hartman*'s probable cause requirement solely to First Amendment retaliatory arrest and prosecution cases. Rather, its logic extends to Fourth Amendment false arrest cases like Beck's, at least to the extent that the plaintiff must prove the absence of probable cause to rebut the presumption of independent prosecutorial judgment, when a prosecutor's actions are interposed between the actions of investigating officials and the arrest. Ordinarily, however, the plaintiff bears the burden of proving the absence of probable cause anyway in a Fourth Amendment false arrest case. Proving lack of probable cause is usually essential to demonstrating that the plaintiff's Fourth Amendment rights were violated. As a practical matter, consequently, *Hartman* will rarely add to the plaintiff's ultimate burden in a § 1983 false arrest case." 527 F.3d at 864.

Beck concluded that a plaintiff must prove the lack of probable cause in all constitutional tort cases, not just those under the Fourth Amendment. "[I]n ***any*** constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution, it is necessary, if not sufficient, that a plaintiff seeking to sue nonprosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution show the absence of probable cause." 527 F.3d at 865.

Because there is no circuit conflict with the Court of Appeals' decision below, the Petition should be denied.

CONCLUSION

For all the reasons stated above, McSherry's Petition should be denied.

Respectfully submitted,

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No. 09-1284

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In The
Supreme Court of the United States

LEONARD MCSHERRY,

Petitioner,

v.

CITY OF LONG BEACH, LONG BEACH POLICE DEPARTMENT, NORMAN TURLEY, and CARTHEL S. ROBERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents submit this Supplemental Opposition to Petition for Writ of Certiorari under S.Ct.R. 15.8 to correct a misstatement in Petitioner's Reply Brief.

Petitioner states that the Naval investigator did not testify at Petitioner's criminal trial (Reply 2) and that the Ninth Circuit recited the same factual error concerning the trial record (Reply 2, n. 1).

Petitioner's statement is inaccurate. The complete transcript of Petitioner's criminal trial was included as an exhibit in support of Respondents' motion for summary judgment in the district court and was also included in the Excerpts of Record filed with the Ninth Circuit. Excerpts of Record, Vol. 1, p. 277 – Vol. 4, p. 920. Among the witnesses that testified at Petitioner's criminal trial was the Naval investigator (whose name was Tammi Warmack). Excerpts of Record, Vol. 3, pp. 653-662.

Respectfully submitted,

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In The
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Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

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FEDERAL RULES

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Petitioner, Leonard James McSherry ("McSherry"), for his Reply In Support Of Petition For Writ of Certiorari, states as follows:

STATEMENT OF THE CASE

Statement of Additional Facts

Evidence of all alleged pretrial identifications of McSherry as the perpetrator of the 1988 kidnapping and rape of Candice, the description of the vehicle used in her abduction and the specific description of the interior of the home where the rape took place, came from police reports prepared by Respondent officer Turley ("Turley"), after the initial descriptions did not match McSherry or any vehicle or residence associated with him. Cf. Opposition at pp. 1-3.

It was only after Turley, supervised by Respondent officer Roberson ("Roberson"), became involved in the investigation and unduly suggested or coerced Candice to identify McSherry at the photo showup, that Candice identified McSherry as the "stranger" she had identified at the showup.

Turley fabricated police reports and falsely testified at McSherry's trial that Candice identified McSherry's father's yellow Mazda as the vehicle into which she was abducted and false reports and perjured testimony concerning the interior of the residence in which she was assaulted.

The Naval investigator never testified at McSherry's state criminal trial. Cf. Opposition, at 3-4. At her deposition in 2003 the investigator first testified she had little recollection of Turley's interview with Candice and could not recall any specific questions asked by Turley, nor the form of the questions.[1]

(The following additional facts are relevant to Respondents' argument at pp. 9-20 of their Opposition).

On April 16, 1988, Long Beach Police Department officers arrested John Larocco as a suspect in the case because he drove a green pick-up truck and had physical features of the suspect described in the initial witness interviews. After Larocco was arrested on April 18, Roberson determined he was not the perpetrator, found no probable cause to detain Larocco and released him on April 18.[2] On April 19, Turley conducted the showup with Candice, which included photos of McSherry and Larocco. Turley testified at his deposition that the intent of the showup was to exclude Larocco as a suspect and he merely included McSherry's photo as "filler."

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[1] The Ninth Circuit recited the same factual error concerning the trial record. See Appendix at 7.

[2] Larocco was released pursuant to Cal. Pen. Code section 849 subd. (b)(1), which provides, in part, that a peace officer may release a person from custody if he or she is satisfied "there are insufficient grounds for making a criminal complaint against the person arrested."

Approximately two years before the investigation in this case, Turley and Roberson had investigated and conducted extensive surveillance on McSherry as a possible suspect in another Long Beach sexual offense.

Turley deviated from his usual practice of having a police witness present during the questioning of a child, both on the April 19 and April 21 interviews of Candice. Turley had attended a recent "POST"[3] training session for offenses against children. In interviewing Candice, Turley did not follow the POST procedures he had learned. He also failed to record the interviews of Candice. The investigation of the kidnapping of Candice generated much local publicity and attention from the Long Beach Police Department, including its Chief. According to Turley, by April 19, after almost six weeks of investigation, there were "no possible suspects," there were "no more leads," the investigation "had come to an end."

At her deposition in December 2002, Candice testified that when Turley first showed her the photos, she picked out one photo, which was not McSherry, but Turley pointed at another photo and said something like "isn't this the guy?" Turley pointed to McSherry's photo before she did. Candice

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[3] The Commission on Peace Officer Standards and Training (POST) was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.

also testified at her 2002 deposition that the second time she was shown photos, Turley pointed to the same picture as before and had "guidance" in picking out the photo of McSherry.

(The following additional facts are relevant to Respondents' argument on pp. 11-12 of the Opposition).

The prosecutor testified at his deposition that he determined the photo showup by Turley was not suggestive by looking at the photos without inquiring whether Turley influenced Candice's identification. The prosecutor had little or no recollection of his investigation relating to Candice's brother's descriptions. Although the prosecutor was aware that Candice's initial description of the perpetrator was contrary to McSherry's physical characteristics, he asked Candice no questions to resolve the discrepancies. The prosecutor also did not inquire into the circumstances of the purported photo identification by Candice of the yellow Mazda vehicle or her purported description of the interior of McSherry's grandparents' house. The prosecutor supported his filing decision on the alleged detailed description of the interior of the house given by Candice.

At her December 2002 deposition, Candice denied she ever gave Turley the details of the interior of the house that Turley attributed to her in his testimony at McSherry's trial. Candice testified that she was taken to a motel room; there was no blue sheet in the room, no circular mirror, no folding door, no bird; she never gave Turley the description of the interior of

the residence he attributed to her in his trial testimony.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Ninth Circuit Conflicts With Decisions Of This Court And Decisions Of Other Circuits.

A. There Was No Probable Cause To Arrest And Prosecute McSherry.

Respondents' argument stands the probable cause requirement of 42 U.S.C. §1983 on its head. Respondents claim that, for purposes of summary judgment, probable cause for arrest and prosecution exists, even if the arrest and prosecution of the plaintiff are the result of an officer's undue suggestion or coercion of witnesses or fabrication of evidence. But an arrest based on intentionally or recklessly false statements material to probable cause violates the Fourth Amendment. *Herring v. United States*, ___ U.S. ___, 129 S. Ct. 695, 703 (2009); *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). Due process prohibits prosecution on criminal charges based on fabricated evidence. *Devereaux v. Abbey*, 263 F.3d 1070, 1074-1075 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000).

Second, Respondents' argument that Petitioner's prior record or criminal history constitute probable cause is foreclosed by *Beck v. Ohio*, 379 U.S. 89, 96 (1964), where this Court stated that to find criminal

history "constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will."

Finally, Respondent asserts the sheriff's crime lab report provided probable cause for arrest because because it concluded McSherry "was a possible donor of the semen taken from Candice's rape kit." Opposition, at p. 8. This report, which concluded McSherry "could not be excluded as the person whose semen was found," *McSherry v. City of Long Beach*, 584 F.3d 1129, 1134 (9th Cir. 2009), does not establish probable cause to arrest for summary judgment purposes. That determination is one for the jury after hearing evidence of the percentage of the male population that could have been the source of that evidence.

B. Probable Cause To Arrest And Prosecute McSherry Was Based On Fabricated Evidence Or Was Otherwise Tainted By Misconduct.

McSherry's absence of probable cause claims are based on fabrication, coercion or undue suggestion of Candice's identification of McSherry as the perpetrator, despite facts that Turley and Roberson knew or should have known establishing McSherry was innocent. The evidence presents a sufficient basis to establish a due process violation, and to avoid summary judgment. See *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000).

Respondents mistakenly assert that McSherry's claims are based on discrepancies between the initial identifications by Candice, her brother, the independent witness Davis[4] and the subsequent photo identifications conducted by Turley. Opposition, at pp. 9-10. However, summary judgment was improper because Turley's purported reason for including McSherry's photo in the showup, as "filler," can easily be discredited by a trier of fact, since Larocco had been excluded as a suspect the day before the photo showup. The failure to observe the POST procedures learned by Turley could allow a jury to find that he intentionally ignored this training to create probable cause for the arrest of McSherry. This evidence also establishes Turley's knowledge of how to avoid suggestive interviews of children in order to obtain reliable information. The evidence could result in a jury finding he used investigative techniques that they knew or should have known would result in the conviction of an innocent person. The jury could also find that Turley and Roberson were pressured by superiors in the Long Beach Police Department and publicity about the case to find a suspect, since by April 19, the investigation "had come to an end." Finally, Candice's deposition testimony provides evidentiary basis for the jury to find that Turley fabricated, coerced and/or unduly suggested McSherry as the perpetrator using the Mazda vehicle associated with him.

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[4] See Petition at pp. 3-4.

C. The Prosecutor Did Not Exercise Independent Judgment In Filing Charges And The Decision Of The Ninth Circuit Is Contrary To Other Decisions Of Courts of Appeals.

Respondents remarkably claim the decision of the court below is not contrary to decisions of other circuits since "McSherry was arrested and charged based on probable cause untainted by police misconduct and the prosecutor conducted an exhaustive independent investigation." Opposition, at pp. 13-17.[5] The cited cases do not support Respondents' conclusion they were based on arrests or prosecutions that lacked probable cause.

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) involved a 1983 action based on the alleged fabrication of evidence by the prosecutor in his investigative capacity and the presentation of false evidence to the grand jury. As here, the fabricated evidence was the basis of arrest and prosecution.

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[5] The prosecutor's alleged "independent investigation" consisted of reinterviewing the witnesses tainted by the suggestive and coercive tactics of Turley and relying on the fabricated evidence of Candice's description of the interior of McSherry's grandparents' house in making the filing decision. McSherry presented ample evidence the prosecutor's "independent investigation" was based on Turley's suggestive interviews and fabrications and, in part, on Candice's "accurate description" of details of the interior of a place where she had never been.

In *Buenrostro v. Collazo*, 973 F.2d 39, 45 (1st Cir. 1992), officers had probable cause for arrest, but ignored the rule of *Payton v. New York*, 445 U.S. 573, 585 (1980), that warrantless searches or seizures occurring within a person's home are "presumptively unreasonable."

Burke v. McDonald, 572 F.3d 51, 53 (1st Cir. 2009) concerned an arrest warrant based on bite mark analyses that implicated the 1983 plaintiff in a murder for which he was arrested pursuant to a warrant. The affiant did not inform the issuing magistrate of DNA analyses that excluded the plaintiff as the source of DNA collected from the victim's body.

Jones v. City of Chicago, 856 F.2d 985, 989-991 (7th Cir. 1988) involved a fabricated identification by police officers of the 1983 plaintiff that resulted in his indictment by a grand jury for murder and other violent offenses. As here, the fabricated evidence constituted the probable cause for arrest, indictment and prosecution.

In *Anthony v. Baker*, 767 F.2d 657, 659 (10th Cir. 1992), the prosecuting attorney filed a criminal information based on false information supplied by the defendant officer and was held to answer for trial at a preliminary hearing based on such evidence. As here, there was probable cause for the filing and holding the defendant to answer, but the probable cause was fabricated by the investigating officer.

The Ninth Circuit panel decision conflicts with this precedent. The court below ruled summary judgment was proper because probable cause existed for McSherry's arrest. "[B]efore McSherry was arrested, the victim on two occasions positively identified McSherry as her attacker, and also identified his father's car as the vehicle used to facilitate the crime." *McSherry v. City of Long Beach*, 584 F.3d 1129, 1134 (9th Cir. 2009). Fabricated probable cause is not probable cause.

II. The Decision Of The Ninth Circuit Conflicts With Opinions Of Other Circuits That Complaining Witnesses Are Not Absolutely Immune From Perjury.

Another panel of the Ninth Circuit has held that *Malley v. Briggs*, 475 U.S. 335 (1986), creates an exception to the absolute trial immunity of *Briscoe v. Lahue*, 460 U.S. 325 (1983), for officers who serve as the "functional equivalent" of complaining witnesses. *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997). The court noted "The Second, Fifth, Seventh, and Tenth Circuits have expressly concluded [ ] that law enforcement officials are not entitled to absolute immunity for false testimony when they function as complaining witnesses." *Id.*, at 1199.

Whether a police officer is a complaining witness is a question of fact. *Anthony v. Baker*, 955 F.2d 1395, 1399-1400 and fn. 2 (10th Cir. 1992). An officer's "role

in actively instigating, encouraging, and/or perpetuating" the prosecution makes him the functional equivalent of a complaining witness. *Enlow v. Tishomingo County*, 962 F.2d 501, 511-512 (5th Cir. 1992); see also *White v. Frank*, 855 F.2d 956, 959-961 (2d Cir. 1988).

The Third and Eleventh Circuits have rejected the reasoning of *Anthony v. Baker* and *White v. Frank* by refusing to read into perjury claims the complaining witness exception of *Malley*. See *Kulwicki v. Dawson*, 969 F.2d 1454, 1467, fn. 16 (3d Cir. 1992); *Rehberg v. Paulk*, 589 F.3d 1268 (11th Cir. 2010).

Respondents concede complaining witnesses have no absolute immunity for trial perjury, but contends that summary judgment was proper because Candice, not Turley, was the complaining witness since she identified McSherry. Opposition, at 22-24. But the identifications by Candice were coerced or unduly suggested and the identification of the vehicle and the detailed description of the interior of the residence were fabricated by Turley. McSherry presented sufficient evidence precluding summary judgment on a claim of absolute immunity for perjury because Turley "perpetuated" the false criminal charges against McSherry through his trial perjury as part of his "instigation and encouragement" of those charges. As in *Harris v. Roderick*, 126 F.3d at 1199, Turley's trial testimony was "a step in the overall plan." The absence of critical inculpatory evidence in Candice's unsuggested or uncoerced pretrial statements and preliminary hearing and trial

testimony create a factual issue as to Turley being a "complaining witness." Also, there can be more than one complaining witness. See *Kalina v. Fletcher*, 522 U.S. 118, 129-130, 131 (1997) (prosecutor acting as complaining witness when she certified facts in warrant as true). In *Kalina*, the prosecutor's allegedly false testimony, which was not entitled to absolute immunity, consisted partly of statements that an accused burglary suspect was positively identified "from a photo montage" by another witness. *Id.*, at 121. As here, the prosecutor's alleged false testimony related to another witness's purported identification of the plaintiff. *Id.*, at 121, 129-30. Under these circumstances, this Court found that, by personally vouching for the truth of the statements inculpating the petitioner, the prosecutor acted as a "complaining witness." *Id.*, at 131.

III. There Is A Conflict In Circuit Courts Concerning The Applicability Of *Hartman v. Moore* To Non Retaliatory First Amendment Claims, An Issue That Should Be Decided By This Court.

Respondents claim that there is no conflict in the circuits concerning the applicability of *Hartman v. Moore*, 547 U.S. 250 (2006) to constitutional torts other than retaliatory First Amendment prosecution cases. Opposition, at 26-27. Respondents are mistaken. See *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877, fn. 7 (9th Cir. 2008) (recognizing that *Hartman*'s absence of probable cause element of causation

applies to retaliatory prosecution claims and is inapplicable to "an ordinary retaliation action."); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (same); *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) (*Hartman* rule inapplicable where causation turns on defendant's actions alone and no "bridge" between motive and action is necessary).

Other circuits and courts have extended the *Hartman* rule beyond its original limits. See *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) ("*Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present"); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) (*Hartman* applicable to retaliatory prosecution claims where the police officers obtained an indictment directly from a grand jury without intervening actions of prosecutor); *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (*Hartman* applicable to any constitutional tort case in which the prosecutor has initiated a prosecution).

Apart from any conflict in the circuits, extending *Hartman*'s no probable cause pleading and proof requirement to other than First Amendment retaliatory prosecution claims is an additional ground for granting the Petition, because the court below "has decided an important question of federal law that has not been, but should be, settled by this Court."[6] By

[6] Rules of the Supreme Court, Rule 10(c).

extending the *Hartman* rule to all 1983 claims in which a prosecutor initiates an action, the court below has provided shelter to unconstitutional conduct by Respondent officers, committed before the existence of probable cause for arrest or after probable cause for prosecution.[7] See also Petition, at 20-22.

CONCLUSION

For all of the foregoing, Petitioner requests this Court grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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[7] As explained in the Petition at 23-27 and above, even if the *Hartman* rule were made applicable by this Court to other than First Amendment retaliatory prosecution claims, McSherry presented sufficient evidence of manufactured probable cause to avoid summary judgment.